relies solely on the conclusion that a second physician would not be needed during an dilatation and evacuation procedure performed after viability because there was no chance of fetal survival. The improper medical practice of one isolated doctor should not used as an excuse for invalidating a section of state law which attempts to promote and protect human life. A viable fetus is a child which, given a fair chance by the presence of a doctor whose sole purpose it is to protect that child, may live.

The Court of Appeals invalidated Section 188.047, requiring pathology reports with respect to tissue samples taken at the time of all abortions. The Court of Appeals framed the issue thusly:

> "The issue here is not whether pathology reports are useful and even necessary in some cases. They clearly are. Testimony indicated that abormalities in the tissue may warn of serious, possibly fatal disorders. Instead, the question here is whether Missouri has shown any reason why the physicians and medical facilities performing abortions cannot make medical judgments about the desirability of a pathology report in an individual case, while physicians and medical facilities performing all other types of surgery are free to exercise their professional judgment." (Appendix at 95)

As testimony at trial established, only through a pathological examination is there any assurance, independent of the attending physician's own unschooled judgment, that the women upon whom the procedure was performed was in fact pregnant, and if so, that the pregnancy was in fact terminated completely. The additional benefits to the woman are the opportunity for a trained pathologist to discover the presence of a molar pregnancy, a hydatitaforme mole or other precancerous growths, and a variety of other prob-

lems which can only be discovered through a pathological examination. That the State of Missouri's interest in the maintenance of good medical standards and in maternal health are served by this requirement is clear. The singling out of abortions for pathological reports is rational. Other surgical procedures are almost always performed in hospitals where pathological studies are taken as a matter of course. On the other hand, the vast majority of abortions are performed in clinics which will not, absent a clear statutory requirement that they do so, routinely increase their costs or complicate their normal assembly line procedures by taking the time necessary to protect the health of their surgical patients. The Court of Appeals accepted as true the State's testimony that examinations of fetal tissue by pathologists was good medical practice.

The Court of Appeals affirmed the award, by the District Court, of $22,037.73 in attorneys' fees and costs, including specifically $19,279.00 in attorneys' fees (Appendix at 98-99). Plaintiffs originally identified nine sections of the Missouri statutory scheme for challenge in their complaint. They subsequently did not pursue their challenge to Section 188.075. Of the remaining eight sections which were actively challenged at trial, the District Court declared Sections 188.025, 188.028, 188.030 and 188.063 to be unconstitutional in their entirety. The District Court also found that portions of Section 188.039 were unconstitutional upholding the remainder. Sections 188.020, 188.047 and 188.052 were upheld as written. Subsequently, the Eighth Circuit on appeal reversed the District Court with respect to Section 188.028 and two out of the three sections of Section 188.030, effectively finding for the defendants in those instances. The Court of Appeals did give the plaintiffs an additional minor victory by reversing the Court of Appeals with respect to the constitutionality of Section 188.047. Nevertheless, the Eighth Circuit did not reduce the award

of attorneys' fees to reflect plaintiffs' partial success even though it was aware, on the record, that the District Court had allowed every hour claimed by the attorneys for plaintiffs.

The basis for federal jurisdiction in the District Court was Title 28 U.S.C. § 1343(3) and Title 42 U.S.C. § 1983.

REASONS FOR GRANTING THE WRIT

I.

The decision of the court below invalidating the Missouri requirement that abortions performed after twelve weeks of gestation be performed in a hospital is in conflict both with the applicable decision of this Court in Roe v. Wade and with decisions of other federal courts of appeal.

The United States Court of Appeals for the Eighth Circuit, affirming the United States District Court for the Western District of Missouri, invalidated Missouri statute Section 188.025 requiring that every abortion performed subsequent to the first twelve weeks of pregnancy shall be performed in a hospital. In so doing, the Eighth Circuit acted in direct contradition to the clear and controlling mandate of this Court as stated in *Roe* v. *Wade*, 410 U.S. 113, at 163-164, *reh. den.*, 410 U.S. 959 (1973).

> "With respect to the State's important and legitimate interest in the health of the mother, the 'compelling' point, in the light of present medical knowledge, is at approximately the end of the first trimester. This is so because of the now-established medical fact, . . . that until the end of the first trimester mortality in abortion may be less than mortality in normal childbirth. It follows that, from and after this point, a State may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health. *Examples of permissible state regulation in this area are requirements* as to the qualifications of the person who is to perform the abortion; as to the licensure of that person; *as to the facility in which the procedure is to be performed, that is, whether it must be a hospital or may be a clinic or some other place of less-than-hospital status;* as to the licensing of the facility; and the like.
>
> . . . .

To summarize and to repeat:

. . . .

. . . For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interests in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health." (Emphasis added)

Clearly, in the face of such clearly stated and applicable precedent, the court below erred by invalidating the Missouri statutory requirement that abortions performed after the first trimester of pregnancy be performed in hospitals.

The decision of the Eighth Circuit also conflicts with the decision of at least one other federal court of appeal on this precise issue. In *Akron Center for Reproductive Health, Inc.* v. *City of Akron,* 651 F.2d 1198 (6th Cir. 1981), the same general categories of evidence were offered by the plaintiffs in support of their attempt to invalidate a second trimester hospitalization requirement in the City of Akron. The plaintiffs, as in the present case, presented proof purporting to show (1) that dilatation and evacuation abortion procedures, performed early in the second trimester, were safer than birth and could be safely performed outside of hospitals, and (2) that the requirement that such procedures be performed in hospitals burdened the decision of the woman to abort because hospitalization was more expensive than clinic procedures, and because dilatation and evacuation procedures were not readily available in the hospitals operating within the City of Akron. The evidence proffered by plaintiffs in the present instance was almost identical. Nevertheless, the Sixth Circuit affirmed a district court holding that the Akron city ordinance requiring hospitalization after the first trimester was constitutional. 651 F.2d at 1210.

In reaching its decision directly in conflict with that reached by the Eighth Circuit, the United States Court of Appeals for the Sixth Circuit relied strongly on *Gary-Northwest Indiana Women's Services, Inc.* v. *Bowen*, 496 F.Supp. 894 (N.D.Ind. 1980), *aff'd sub nom., Gary-Northwest Indiana Women's Services, Inc.* v. *Orr*, ____ U.S. ____, 101 S.Ct. 2012, 68 L.Ed.2d 321 (1981). In *Gary-Northwest*, a three-judge district court was confronted with proof similar to that offered by plaintiffs in the present case concerning the safety of dilatation and evacuation procedures during the early stages of the second trimester and the extra cost of hospitalization. With respect to the extra cost of hospitalization and the burden that cost would place upon pregnant women, the United States District Court for the Northern District of Indiana stated that:

> "The combination of the hospitalization requirement and the pregnant women's indigency does not render unconstitutional this pursuit of Indiana's legitimate, compelling, interest in protecting maternal health. The obstacle which the women face is not the hospitalization requirement, but the women's indigency. . . ." 496 F.Supp. at 901.

With respect to the safety of performing dilatation and evacuation procedures in the early stages of the second trimester, that district court stated as follows:

> "It would be impractical for the constitutionality of a second trimester regulation to depend on a factual question, such as whether the regulation in fact reduced maternal morbidity and mortality. Interpreting *Roe* to require that second trimester regulations except specific types of abortions which may be safer than childbirth would require relitigation of the regulation's constitutionality with each change in the availability of abortions, with each improvement in abortions, with each improvement in abortion technique,

and with each publication of statistics showing that abortion skills had improved. Such as interpretation of *Roe* would result in repeated relitigation of the constitutionality of the same statute. It is the policy of the Supreme Court to avoid, if possible, the creation of rules of law which increase litigation. *Roe* should not be given an interpretation which results in repeated relitigation of a statute's constitutionality. *Roe* does not render the constitutionality of second trimester regulations subject to either the availability of abortions or the improvements in medical techniques and skills.

The test for determining the constitutionality of statutes regulating second trimester abortions is not whether the statute has the statistically demonstrable result of decreasing maternal morbidity or mortality for specific groups of abortions. Whether, as a matter of fact, it is statistically demonstrable that the regulation results in decreased maternal morbidity and mortality is a matter to be considered, but it is not the ultimate test. The ultimate test is a broader test: whether the legislature acted reasonably in determining that the regulation would promote maternal health. Furthermore, the statistics used to determine the reasonableness of a regulation would have to be the statistics not for a specific group of abortions, but for all the abortions to which the regulation applies. A statutory regulation of second trimester abortions is constitutional if it was reasonable for the state to conclude that the regulation would promote maternal health.

It was reasonable for Indiana to conclude that the second trimester hospitalization requirement would promote maternal health." 496 F.Supp. at 901.902.

This Honorable Court affirmed without opinion the judgment of the three-judge district court in the *Gary-*

Northwest Indiana case. As the Sixth Circuit held in upholding a second trimester hospitalization requirement:

> "Many of the same arguments for holding the requirement that all second trimester abortions be performed in a hospital unconstitutional which were made in the present case were made by the plaintiffs in *Gary-Northwest*. Though the evidence on this issue in the present case was more detailed than that produced in *Gary-Northwest*, the thrust of the plaintiffs' proof and arguments was the same. The Supreme Court has now had an opportunity to retreat from the 'bright line' drawn in *Roe* v. *Wade* and has declined to do so. . . ." *Akron Center for Reproductive Health, Inc.* v. *City of Akron, supra at* 1210.

II.

The decision of the Eighth Circuit invalidating the Missouri requirement that pathology reports be prepared for all abortions conflicts with a decision out of the United States Court of Appeals for the Seventh Circuit.

The Eighth Circuit, in reversing the District Court, invalidated Section 188.047 of the Revised Statutes of Missouri, requiring a representative sample of tissue removed at the time of each abortion to be submitted to a pathologist for a report, on the basis that the requirement increased the cost of the abortion, thereby burdening the women's decision to abort, and because Missouri has not required by statute pathology reports following other medical procedures (Appendix at 92-97).

The court in *Wynn* v. *Scott*, 449 F.Supp. 1302, 1322 (N.D.Ill. 1978), *appeal dismissed*, 439 U.S. 8 (1978), *aff'd*, 559 F.2d 193 (7th Cir. 1979), was confronted with a substantially identical Illinois statute. That court reached the opposite result from the Eighth Circuit and upheld the

statutory section. The cross-petitioners submit (1) that there is a conflict among the federal courts, and (2) that this specific Missouri statute, as acknowledged by the lower court (Appendix at 94), is rationally related to the State's legitimate interest in preserving maternal health.

III.

The decision of the Eighth Circuit, by invalidating the Missouri statutory requirement that a second physician be in attendance at the abortion of a viable fetus, has decided a federal question in a way so as to conflict with the applicable decision of this Court in Roe **v.** Wade.

Section 188.030, Revised Statutes of Missouri, requires that a second physician be in attendance, for the purpose of preserving the life and health of the aborted infant, when an abortion is performed on a viable fetus. The Eighth Circuit found that requirement unconstitutional. (Appendix at 84). The lower court found the section overbroad as the result of its factual conclusion that no child could survive a dilatation and evacuation abortion procedure making the attendance of a second physician to protect the health of such child unnecessary. This factual finding was made despite an overwhelming factual record developed in the District Court, supported by experts who testified for both plaintiffs and defendants, that dilatation and evacuation should never be the procedure of choice at a sufficiently late date in the pregnancy that the fetus would be viable. In effect, the lower court was condoning not only bad medical practice but murder by some physicians.

We quote from *Roe* v. *Wade,* 410 U.S. 113, 163-164 (1973):

> "With respect to the State's important and legitimate interest in potential life, the 'compelling' point is at viability. This is so because the fetus then presumably has the capability of meaninful life outside

the mother's womb. State regulation protective of fetal life after viability thus has both logical and biological justifications. If the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother."

Obviously, if the State's interest in potential human life after viability is so compelling as to allow it to proscribe abortion, then that interest is sufficiently compelling, under controlling Supreme Court precedent, to allow the state to require the attendance of a second physician to preserve and care for that potential human life.

IV.

The decision of the Eighth Circuit awarding attorneys' fees to plaintiffs without reference to the partial nature of their success conflicts with decisions of other federal courts of appeal.

In addressing the contention of the cross-petitioners that plaintiffs did not prevail on every issue and that attorneys' fees should be proportioned to reflect the extent to which they did prevail, the Eighth Circuit reached the following conclusion:

"The result obtained is only one factor to be considered, and it is not necessarily an abuse of discretion for the district court to award attorneys' fees based on all the work performed and not just on the claims on which the plaintiffs were successful. '[A]ttorney's fees awarded under Section 1988 should not be limited to hours expended on those issues to which the plaintiff was successful.' *Crain* v. *City of Mountain Home*, 611 F.2d at 729 n.7. *See also Johnson* v. *Nordstrom-Larpenteur Agency*, 623 F.2d 1279, 1282 (8th Cir.), *cert. denied*, ____ U.S. ____, 101 S.Ct. 622, 66 L.Ed.2d 504

(1980); *Brown* v. *Bathke*, 588 F.2d 634, 637 (8th Cir. 1978)." Appendix at 98-99.

Of the eight sections challenged by plaintiffs at the trial of this case, four were found by the District Court to be unconstitutional and one other was partially invalidated. Three of the sections were upheld by the District Court as written. Nevertheless, the appellate court approved the award of attorneys' fees by the District Court of all hours claimed by the attorneys for the plaintiffs before the District Court. The Eighth Circuit did this even though their opinion on appeal further restricted the extent to which the plaintiffs succeeded in their lawsuit. For example, the District Court was reversed on the constitutionality of Section 188.028, relating to consent for minors, holding in effect for the defendants on perhaps the most important of all the statutory sections challenged in the lawsuit, and the only failure which has prompted plaintiffs to seek review by certiorari. The appellate court also reversed the District Court on two-thirds of Section 188.030, relating to abortion of viable fetus, again one of the more important of the statutory sections attacked on the case. On the other hand, the plaintiffs were successful before the Eighth Circuit in having the District Court's approval of the pathology report section reversed. The cross-petitioners submit that this section, although important, does not represent as great an impact in the area of abortion as did those sections won by defendants on appeal.

The cross-petitioners reiterate that the Eighth Circuit affirmed the award by the District Court of attorneys' fees for every single hour claimed by the attorneys for the plaintiffs during the trial of this lawsuit before the District Court.

The opinion of the Eighth Circuit regarding attorneys' fees is in direct conflict with the positions of the First Circuit, *Nadeau* v. *Helgemoe*, 581 F.2d 275, 279 (1st Cir.

1978), the Third Circuit, *Hughes* v. *Repko*, 578 F.2d 483 (3rd Cir. 1978), the Fourth Circuit, *Morton* v. *Charles County Board of Education*, 373 F.Supp. 394, 411 (D.Md. 1974), *aff'd*, 520 F.2d 871 (4th Cir. 1974), the Seventh Circuit, *Batiste* v. *Furnco Construction Corporation*, 503 F.2d 447, 451 (7th Cir. 1974), *cert. denied*, 420 U.S. 928 (1975), the Ninth Circuit, *Schaeffer* v. *San Diego Yellow Cabs, Inc.*, 462 F.2d 1002, 1008 (9th Cir. 1972), and *Sethy* v. *Alameda County Water District*, 602 F.2d 894 (9th Cir. 1979), and the Tenth Circuit, *Pearson* v. *Western Electric Installation Organization District Office*, 542 F.2d 1150 (10th Cir. 1976) and *Gurule* v. *Wilson*, 635 F.2d 782, 794 (10th Cir. 1980) (A complete review of Tenth Circuit precedent in this issue, and especially the confusing statements made in *Gurule*, does make the position of that Court of Appeals somewhat ambiguous.[1]

These conflicts between the actions taken by the Eighth Circuit and the District Court in this case and the positions maintained by the majority of the Circuit Courts of Appeals justify the grant of certiorari to review this judgment.

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[1] Apparently in accord with the position taken by the Eighth Circuit are the Fifth Circuit, *Jones* v. *Diamond*, 636 F.2d 1364 (8th Cir. 1981) and the Sixth Circuit, *Northcross* v. *Board of Education of Memphis City Schools*, 611 F.2d 625, 635 (6th Cir. 1979). The cross-petitioners found no relevant precedent from the District of Columbia and Second Circuits.

CONCLUSION

For the foregoing reasons, cross-petitioners request this Court to issue its writ of certiorari to the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

JOHN ASHCROFT
Attorney General

MICHAEL L. BOICOURT
Assistant Attorney General

Broadway State Office Building
P.O. Box 899
Jefferson City, Missouri 65102-0899
314-751-3321

Attorneys for Cross-Petitioners.

February, 1982

APPENDICES

APPENDIX A

PLANNED PARENTHOOD ASSOCIATION OF KANSAS CITY, MISSOURI, INC., et al., Plaintiffs,

v.

John ASHCROFT et al., Defendants.

No. 79 4142 CV C.

United States District Court, W. D. Missouri, C. D.

Jan. 23, 1980.

OPINION AND ORDER

ELMO M. HUNTER, District Judge:

This is an action for declaratory and injunctive relief in which plaintiffs challenge the constitutionality of several sections of the 1979 Missouri act relating to the regulation of abortions ("the Act").[1] This Court has jurisdiction under 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3).

Plaintiffs are Planned Parenthood Association of Kansas City, Missouri, Inc., and Reproductive Health Services, not-for-proft Missouri corporations. Plaintiffs maintain and operate out-patient clinics in Kansas City and St. Louis, Missouri, respectively, at which medical services are offered to the public, including first trimester abortions performed by staff physicians and pregnancy-related counseling.

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[1] House Committee Substitute for House Bill Nos. 523, 626 and 902, 80th Gen. Ass'y, 1st Reg.Sess. (1979). The full text of the Act is set out in the Appendix.

Plaintiff physicians are Allen S. Palmer, D. O., and Naim S. Kassar, M. D. Dr. Palmer is licensed to practice medicine in the State of Missouri and performs first trimester abortions on an out-patient basis, both at the Reproductive Health Services clinic and as part of his private medical practice. Dr. Palmer does not perform abortions after the first trimester of pregnancy, but would do so absent the statutory requirement that post-twelve week abortions be performed only in a hospital. Dr. Kassar is also licensed to practice medicine in the State of Missouri. As a part of his medical practice, Dr. Kassar performs first trimester abortions on an out-patient basis in the Planned Parenthood clinic and in a hospital setting. Dr. Kassar performs post-first trimester abortions in a hospital setting, but under certain conditions, would perform such abortions in an out-patient clinic, absent the statutory requirement that post-twelve week abortions be performed only in a hospital.

Defendants are the Honorable John Ashcroft, Attorney General of the State of Missouri, and Ralph L. Martin, Prosecuting Attorney of Jackson County, Missouri, who is sued both in that capacity and "as representative of the class of all similar Prosecuting Attorneys of the various counties of the State of Missouri."

The Act was passed by the General Assembly of the State of Missouri on June 15, 1979, and signed into law by the Governor on June 29, 1979. An emergency clause caused the Act to be effective immediately upon the Governor's approval.[2] This action was filed on June 30, 1979, and after a hearing, the Court temporarily restrained enforcement of §§ 188.020, .025, .030, .039, .040, .052, .063, and .075, RSMo, as signed into law on June 29, 1979. Defendants consented to renewal and extension of that order

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[2] *Ibid.*, § A.

pending a determination on the merits. Upon defendants' motion and to maintain the status quo, the temporary restraining order was modified on September 27, 1979, to delete §§ 188.020, .025, and .075, RSMo, from its effect. Full trial on the merits was had on October 15-20, 1979.

I.

Standing

[1] Plaintiff physicians have standing to challenge the constitutionality of the sections at issue in this case. *Singleton* v. *Wulff*, 428 U.S. 106, 98 S.Ct. 2868, 49 L.Ed.2d 826 (1976). Defendants concede that the corporate plaintiffs have standing to challenge § 188.025, the requirement that post-twelve week abortions be performed only in a hospital, and § 188.063, which regulates abortion counseling in "abortion facilities," but assert that the organizations lack standing to litigate the constitutionality of any other of the Act's provisions. In light of the standing of plaintiff physicians, the Court need not reach the issue of the corporate plaintiffs' standing.[3]

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[3] Defendants contend that, excepting §§ 188.025 and 188.063, the Act imposes no obligation or regulation on clinics which offer abortion services but rather is directed at the regulation of physicians who perform abortions. *But see Womens Services, P.C.* v. *Thone*, 483 F.Supp. 1022 (D.Neb.1979) (abortion clinic has standing based on theory of accessory liability under abortion regulation's criminal sanctions); *Akron Center of Reproductive Health, Inc.* v. *City of Akron*, 479 F.Supp. 1172 (N.D.Ohio 1979); *Baird* v. *Bellotti*, 393 F.Supp. 847 (D.Mass. 1975), *vacated and remanded on other grounds*, 428 U.S. 132, 96 S.Ct. 2857, 49 L.Ed.2d 844 (1976). *See also* § 188.075 RSMo ("Any person who contrary to the provisions of [the Act] knowingly . . . aids in the performance of any abortion . . . shall be guilty of a class A misdemeanor. . . ."); § 562.041, RSMo (general criminal accessory liability statute); § 562.056, RSMo (corporate liability statute).

II.

Abortions to be Performed Only by a Physician

Section 188.020 provides: "No person shall perform or induce an abortion except a physician." Plaintiffs' challenge to this restriction is that it prevents a pregnant woman from inducing or performing an abortion on herself. The constitutional infirmity, argue plaintiffs, is two-fold: (1) the statute violates the pregnant woman's constitutional right to "self-treatment," and (2) the Act's penalty provision[4] mandates accessory criminal liability for the physician who, by prescribing an abortion-inducing medication or other abortifacient for a pregnant woman, would aid or abet a non-physician (the pregnant woman herself) to perform or induce an abortion in violation of § 188.020.[5]

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[4] § 188.075, RSMo.

[5] Plaintiffs' medical experts testified of their use of the so-called "morning-after pill," high dosage estrogen prescibed within 48-72 hours following intercourse. The effect of the morning-after pill is to prevent nidation (implantation of the fertilized ovum in the uterine wall). Because the morning-after pill works *after* conception, it is an abortifacient. Plaintiff physicians testified that although the doctor prescribes and provides the abortifacient medication, it is the pregnant woman who decides whether to take the drug and who administers the medication to herself. In such a situation, say plaintiffs, the doctor assists the pregnant woman to abort herself. Plaintiffs suggest that the same reasoning also applies to use of the intrauterine device (IUD); that the doctor's insertion of an IUD aids the woman in aborting herself should conception occur. There was also testimony regarding the development of a new abortifacient in the form of a tampon impregnated with prostaglandins, which could be inserted by the woman and have the effect of self-induced abortion. There was no evidence, however, that this abortifacient is presently available.

Defendants argue that because the morning-after pill and, "in nearly all cases," the IUD work prior to development of the embryo, neither constitutes an abortion within the meaning of the Act. However, the

(Continued on next page)

Plaintiffs do not argue that the legislature intended to include the pregnant woman herself within the limitation imposed by the statute but submit that that "plain wording" of the section does so. Accordingly, the prayed-for relief is "merely . . . a declaration that this Section may not constitutionally apply to women seeking to self-abort or to physicians who assist them in doing so."

The context of the present case makes a determination of the constitutional questions posed by plaintiffs unnecessary. The regulation against abortions performed by nonphysicians has been in effect in the State of Missouri, with substantially similar language, since June 14, 1974.[6] This Court is unaware of any case in which the prohibition on abortion by nonphysicians was ever applied to the pregnant woman herself. The Court has been directed to no decision of the courts of the State of Missouri which interprets the provision in that way. There is nothing in the extensive record in this case which would indicate that the legislature intended to criminalize an act of self-abortion by the pregnant woman herself.[7]

Footnote continued

Act defines "abortion" as "the intentional destruction of the life of an ambryo or fetus in his or her mother's womb *or* the intentional termination of the pregnancy of a mother with an intention other than to increase the probability of a live birth or to remove a dead or dying unborn child." § 188.015.1, RSMo (emphasis added).

[6] Section 188.020(1), RSMo (Supp. 1979) repealed June 29, 1979; § 188.020 of the 1979 Act was enacted in lieu thereof) provided: "No abortion shall be performed . . . except: (1) By a duly licensed, consenting physician. . . ."

[7] Section 188.080, RSMo, provides:

> Any person who is not a licensed physician as defined in section 188.015 who performs or attempts to perform an abortion *on another* as defined in subdivision (1) of section 188.015, is guilty of a felony. . . . (emphasis added)

This section was enacted as a part of the 1974 act relating to abortion and remained in effect at the time of enactment of the 1979 Act.

[2, 3] This Court is obliged to give the regulation that reasonable interpretation which avoids a danger of constitutional invalidity. *United States* v. *Harriss*, 347 U.S. 612, 74 S.Ct. 808, 98 L.Ed. 989 (1954); *State* v. *Metropolitan St. Louis Sewer District*, 365 Mo. 1, 275 S.W.2d 225 (En banc 1955). That reading of the section's prohibition of abortions performed by nonphysicians which would include the pregnant woman herself within its ban raises such a serious constitutional question. Accordingly, it is not adopted by the Court. As applied to a non-physician performing an abortion *on another person*, the statute is not challenged here and is clearly valid. *Connecticut* v. *Menillo*, 423 U.S. 9, 96 S.Ct. 170, 46 L.Ed.2d 152 (1975).

III.

Post-Twelve Week Abortions to be Performed Only in a Hospital

[4] Section 188.025 provides that every abortion performed subsequent to the first twelve weeks of pregnancy shall be performed in a hospital. Both physician plaintiffs testified that, absent statutory prohibition, they would perform post-twelve weeks abortions in an out-patient clinic. Plaintiff's argue that the in-hospital requirement places an undue burden on the abortion decision and on the means of effectuating that decision. Plaintiffs also contend that the requirement does not constitute a reasonable regulation in the interests of maternal health.

In *Roe* v. *Wade*, 410 U.S. 113, 163, 93 S.Ct. 705, 732, 35 L.Ed.2d 147 (1973), the Supreme Court held that "from and after [approximately the end of the first trimester], a State may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health." An example of a permissible subject of regulation was "the facility in which the procedure is to be performed, that is, whether it must

be a hospital or may be a clinic or some other place of less-than-hospital status." In *Doe* v. *Bolton*, 410 U.S. 179, 195, 93 S.Ct. 739, 749, 35 L.Ed.2d 201 (1973), the Court struck down a requirement that all abortions be performed in an accredited hospital but reserved the authority of a state to adopt such a regulation after the first trimester "so long as those standards legitimately related to the objective the State seeks to accomplish."

In *Wynn* v. *Scott*, 449 F.Supp. 1302 (N.D.Ill.), *appeal dismissed sub nom. Carey* v. *Wynn*, 439 U.S. 8, 99 S.Ct. 49, 58 L.Ed.2d 7 (1978), *aff'd*, 599 F.2d 193 (7th Cir. 1979), the district court noted that the Supreme Court "specifically stated" that the state may require post-first trimester abortions be performed only in hospitals. The court upheld as rationally related to maternal health a regulation which required post-first trimester abortions be performed on an in-patient basis in a hospital equipped with life-support equipment for the fetus if there is any "clearly visible evidence" of viability. In that case, the court noted, 449 F.Supp. at 1318:

> The methods of performing abortions after the first trimester are relatively complicated. Injection of saline or prostaglandins into the amniotic sac, and hysterotomies take time and require controlled conditions.

Plaintiffs urge that the record before this Court is significantly different from that before the district court in *Wynn;* that the advancement of medical knowledge renders the reasoning of *Wynn* inapplicable.

The controversy over Missouri's in-hospital requirement centers on the abortion technique known as dilatation and evacuation (D & E).[8] This post-first trimester abor-

[8] Plaintiffs concede that post-first trimester abortion techniques other than D & E, including saline instillation, prostaglandins, hysterotomy and hysterectomy, should be performed only in a hospital.

tion technique was relatively unknown at the time of the 1973 Supreme Court decisions in *Roe* and *Doe* but has come to be a common procedure for the termination of pregnancies of longer than twelve weeks gestation.[9] Plaintiff physicians state that D & E is currently the safest post-first trimester abortion technique up to eighteen weeks gestation and that absent the statutory prohibition they would perform post-first trimester abortions using the D & E method in clinics on an out-patient basis. Plaintiffs' medical experts testified that, consistent with good medical practice, post-first trimester abortions can be done safely in an out-patient clinic, at least up to eighteen weeks gestation. Defendants' experts testified that all post-first trimester abortions, regardless of technique employed, should be performed in a hospital because of the increasing risk accompanying later abortions and the ability of a hospital to better deal with potential complications.[10]

In *Planned Parenthood* v. *Danforth*, 428 U.S. 52, 96 S.Ct. 2831, 49 L.Ed.2d 788 (1976), the Supreme Court held that a Missouri statutory prohibition on the use of saline

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[9] In 1977, 73.3% of reported abortions at 13-15 weeks gestation were done by D & E. Of all reported post-12 week abortions, 38.6% were done by D & E. Utilization of other methods for post-12 week abortions in 1977 was as follows: saline instillation, 38.3%; prostaglandins, 16.5%; hysterotomy, 0.4%; hysterectomy, 0.5%; other and unknown, 5.6%. Center for Disease Control, U.S. Dep't of H.E.W. *Abortion Surveillance 1977*, Table 18.

[10] Defendants' experts testified that a hospital would be equipped with life support systems, an intensive care unit, and a blood bank, and would have the services of an expert anesthesiologist, all of which would be unavailable at a free-standing out-patient clinic. Plaintiffs argue that the emergency room resources of nearby hospitals would be available in case of complications resulting from abortions performed at out-patient clinics.

instillation as a post-twelve abortion technique failed as a reasonable regulation for the protection of maternal health.

> The State, . . . would prohibit the use of a method which the record shows is the one most commonly used nationally by physicians after the first trimester and which is safer, with respect to maternal mortality, than even continuation of the pregnancy until normal childbirth. Moreover, as a practical matter, it forces a woman and her physician to terminate her pregnancy by methods more dangerous to her health than the method outlawed.

Id., at 78-79, 96 S.Ct. at 2845. The court found that the *existence* of prostaglandins instillation, an alternative technique actually safer than saline, did not justify the ban on saline. The prostaglandins alternative was at that time limited to experimental use and, as a practical matter, was unavailable in the State of Missouri.[11] The prohibition of the saline technique was therefore "an unreasonable or arbitrary regulation designed to inhibit, and having the effect of inhibiting, the vest majority of abortions after the first twelve weeks." *Id.*, at 79, 96 S.Ct. at 2845.

On the record before it, this Court is convinced that aside from the question whether it is performed in a hospital or in an out-patient clinic,[12] dilatation and evacuation is the safest of the presently available post-twelve week

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[11] "Such an experimental and limited use of prostaglandin throughout the country does not make it available or accessible to concerned persons in Missouri." *Planned Parenthood* v. *Danforth, supra*, at 77 n.12, 96 S.Ct. at 2845.

[12] Dr. Bernard Nathanson, one of defendants' experts, testified that the morality and morbidity rates for D & E procedures performed outside a hospital were probably no different than those performed in a hospital.

abortion techniques.[13] However, the record also indicates that post-twelve week D & E procedures are performed at only one hospital in the State of Missouri.[14] Thus, the requirement that all post-twelve week abortions be performed in a hospital has the practical effect of making a D & E procedure, the safest post-twelve week technique, an alternative which is simply unavailable to many pregnant women in Missouri. Under the reasoning of the Supreme Court in *Danforth*, the state's limitation of post-twelve week abortions to hospitals cannot stand as a reasonable regulation for the protection of maternal health. The effect of the regulation is to make unavailable the most commonly utilized and the safest post-twelve week abortion technique. As a practical matter, it may force a woman and her doctor to terminate her pregnancy by a method made unavailable. The limited availability of the D & E procedure in a single hospital on the western boundary of the state does not convince the Court that D & E is an accessible or meaningful alternative to large numbers of pregnant women in Missouri, particularly those in rural areas or in the metropolitan St. Louis area on Missouri's eastern border. *See Planned Parenthood* v. *Danforth, supra,* 428 U.S. at 77 n. 12, 96 S.Ct. 2831.

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[13] Mortality rates (per 100,000 cases) for post-12 week abortion techniques for the years 1972-1977 are as follows:

D & E	8.3
Prostaglandins and other agents	10.8
Saline instillation	15.5
Hysterotomy and hysterectomy	45.3

Center for Disease Control, U.S. Dep't of H.E.W., *Abortion Surveillance 1977*, Table 23.

[14] The uncontroverted testimony of Dr. Naim Kassar was that the Truman Medical Center in Kansas City is the only hospital in the State of Missouri which permits post-12 week abortions by D & E. *cf. Poelker* v. *Doe*, 432 U.S. 519, 97 S.Ct. 2391, 53 L.Ed.2d 528 (1977) (a state or city may constitutionally close public hospitals to *all* non-therapeutic abortions).

Missouri's in-hospital requirement for all post-twelve week abortions fails for another reason. In *Planned Parenthood* v. *Danforth*, the Supreme Court held that the state may not grant a third party, in that case the parents of an unmarried woman under the age of eighteen, an absolute veto over the decision of the physician and his patient to terminate the patient's pregnancy. 428 U.S. at 74-75, 96 S.Ct. 2831. *See also Bellotti* v. *Baird (Bellotti II)*, 443 U.S. 622, 639, 99 S.Ct. 3035, 3046, 61 L.Ed.2d 797, 818 (1979). The record before this Court indicates that there is no hospital in the State of Missouri which will admit a woman under the age of eighteen without parental consent.[15] The statute's effect is to impose an absolute parental consent requirement for women under the age of eighteen who desire to terminate pregnancies of longer than twelve weeks gestation. The in-hospital requirement gives the parents of a woman under eighteen who desires a post-twelve week abortion the "absolute, and possibly arbitrary, veto" outlawed by the Supreme Court in *Danforth* and therefore cannot stand.[16]

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[15] Uncontroverted testimony of Drs. Allen Palmer, Naim Kassar, and Robert Crist. There was evidence that a high proportion of women desiring post-12 week abortions are in the younger age group. Reasons for delay in seeking an abortion by women under 18 include a lack of sophistication, psychological denial by the younger woman of knowledge and the means to seek an earlier abortion.

[16] It may be argued that this infirmity is avoided by the provision in § 188.028 for judicial consent or judicially-granted self-consent to an abortion for a woman under 18. Even if that procedure was constitutionally valid, *see* Part IV, *infra*, it does not provide for judicial consent to hospitalization of a woman under 18 or that Missouri hospitals must alter their admissions policies to accept either judicial consent or judicially-granted self-consent and admit women under 18 without parental consent.

Plaintiffs additionally argued: (1) that the increased cost, longer time required, and loss of anonymity associated with an in-hospital post-12 week abortion constitutes an undue burden on the effectua-

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IV.

Consent for Minors

[5] Section 188.028 provides a special procedure to obtain or provide consent for an abortion in the case of a pregnant woman as under the age of eighteen. Unless a minor is "emancipated," in order for her to obtain an abortion she must secure the consent of one parent or guardian, she must have been granted by court order the right to self-consent, or she must have been granted judicial consent to the abortion. The statute sets out a procedure whereby the minor may seek either the right to self-consent or judicial consent. It provides for the filing of an application in the juvenile court by the minor or her next friend and specifies necessary allegations, including the initials of the minor and the names and addresses of her parents, guardian, or person standing in loco parentis. The minor's parents, guardian or person standing in loco parentis are then to be served with copies of the petition and notice of the time and place of the hearing on the minor's application. There is provision for constructive notice by certified mail if service is not had within two days. The Court may appoint a guardian ad litem for the minor if a conflict of interests appears between the child and her parents or guardian. There is provision for the appointment of counsel, in appropriate circumstances, for "any party."

A hearing is to be held within five days of the filing of the petition, at which the court is to hear evidence re-

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Footnote continued

tion of a pregnant woman's abortion decision; and (2) that the in-hospital requirement is actually contrary to the promotion of maternal health due to an increased risk of infection and the prevalent use of general anesthetics in most hospitals. In light of the above, it is not necessary to reach these arguments.

lating to whether the minor should be granted the right to self-consent to an abortion or whether the abortion is in her best interest. The court is then to issue a decree in which it shall, for good cause, take one of the following actions: (1) grant the minor the right to self-consent; (2) find the abortion to be in the best interests of the minor and grant judicial consent, setting forth grounds for so finding; or (3) deny the minor's petition, setting forth grounds on which it was denied. Either the minor or her parents or guardian may appeal from such an order to the Missoui Court of Appeals by giving notice of intent to appeal within twenty-four hours from issuance of the order. The appeal must be perfected within five days of the filing of such notice. The section provides that the Missouri Supreme Court shall, by court rule, provide for expedited appellate review of such cases. Plaintiffs challenge the validity of the consent procedure for minors on the ground that it permits the juvenile court to deny a minor access to an abortion even though she may be sufficiently mature and competent to make the abortion decision on her own.[17]

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[17] Plaintiffs' attack on this section was not limited to a single issue. They also argued that the section is unconstitutional because (1) it mandates parental involvement in all cases, contrary to *Bellotti II*, *supra* (plurality opinion of Powell, J.), *see Charles* v. *Carey*, No. 79 C 454 (N.D.Ill. preliminary injunction filed Nov. 16, 1979); *Women's Community Health Center, Inc.* v. *Cohen*, 477 F.Supp. 542 (D.Me. 1979); *Woman's Services, P.C.* v. *Thone*, – F.Supp. – (D.Neb. partial summary judgment filed Aug. 1, 1979); *Leigh* v. *Olson*, No. A3-79-78 (D.N.D. preliminary injunction filed July 9, 1979); (2) it creates an unjustified distinction between two classes of minors, those who consent to carry a pregnancy to term and undergo normal delivery or Caesarian section and those who consent to have an abortion, contrary to the holding in *Wynn* v. *Carey*, 582 F.2d 1375 (7th Cir. 1978); (3) the alternative judicial proceeding constitutes an undue burden on the abortion decision, *see Wynn* v. *Carey*, *supra*; (4) the statute is unconstitutionally vague because the term "emancipated" is not defined; and (5) that

(Continued on next page)

In *Planned Parenthood* v. *Danforth, supra,* the Supreme Court struck down a requirement that unmarried minors obtain the consent of a parent or person in loco parentis.

> [T]he State does not have the constitutional authority to give a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy regardless of the reason for withholding the consent.

428 U.S. at 74, 96 S.Ct. at 2843. The Court further defined the constitutional limitations in this area in *Bellotti* v. *Baird (Bellotti II),* 443 U.S. 622, 99 S.Ct. 3035, 61 L.Ed.2d 797 (1979), in which it concluded:

> [I]f the State decides to require a pregnant minor to obtain one or both parent's consent to an abortion, it also must provide an alternative procedure whereby authorization for the abortion can be obtained.

443 U.S. at 643, 99 S.Ct. at 3048, 61 L.Ed.2d at 813 (plurality opinion of Powell, J.). In *Bellotti II* the Court considered a Massachusetts consent for minors statute which provided:

> If the mother is less than eighteen years of age and has not married, the consent of both the mother and her parents [to an abortion to be performed on the mother] is required. If one or both of the mother's parents refuse such consent, consent may be obtained by order of a judge of the superior court for good cause shown, after such hearing as he deems necessary.

Footnote continued
the judicial proceeding outlined in the section does not assure the "anonymity and sufficient expedition" required in *Bellotti II, supra,* (plurality opinion of Powell, J.), because it simply authorizes the future promulgation of rules to expedite appellate review in such cases. It is unnecessary to reach these arguments.

443 U.S. at 625, 99 S.Ct. at 3039, 61 L.Ed.2d at 802. Because the statute was susceptible of a construction which might sustain its validity, the Supreme Court initially abstained so that the courts of Massachusetts might provide a conclusive interpretation. *Bellotti* v. *Baird (Bellotti I)*, 428 U.S. 132, 96 S.Ct. 2857, 49 L.Ed.2d 844 (1976). The Supreme Judicial Court of Massachusetts interpreted the statute to authorize the court to refuse its consent if it determined that an abortion would not be in the best interests of the minor, even though the minor might be capable of making an informed and reasonable decision herself. 443 U.S. at 650, 99 S.Ct. at 3051-52, 61 L.Ed.2d at 817-18. The Supreme Court found the Massachusetts statute, as interpreted, constitutionally invalid.

> [I]f the minor satisfies a court that she has attained sufficient maturity to make a fully informed decision, she then is entitled to make her abortion decision independently. We therefore agree with the District Court that [the statute] cannot constitutionally permit judicial disregard of the abortion decision of a minor who has been determined to be mature and fully competent to assess the implications of the choice she has made.

443 U.S. at 650, 99 S.Ct. at 3052, 61 L.Ed.2d at 818 (plurality opinion of Powell, J.).[18]

443 U.S. at 654, 99 S.Ct. at 3053, 61 L.Ed.2d at 820 (concurring opinion of Stevens, J.).

Section 188.028.2(4) of the Missouri Act requires the

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[18] [The Massachusetts statute] does, of course, provide an alternative in the form of a suit initiated by the woman in Superior Court. But in that proceeding, the judge is afforded an absolute veto over the minor's decisions, based on his judgment of her best interests.

juvenile court determine the issue of consent in one of three ways.

> (4) In the decree, the court shall for good cause:
>
> (a) Grant the petition for majority rights for the purpose of consenting to the abortion; or
>
> (b) Find the abortion to be in the best interests of the minor and give judicial consent to the abortion, setting forth the grounds for so finding; or
>
> (c) Deny the petition, setting forth the grounds on which the petition is denied;
>
> . . . . .

Defendants content that the court may deny the petition "provided that it finds that the minor is not mature, and that an abortion would not be in her best interest." Defendants' Post-trial Brief at 26. This procedure cures the defect in *Bellotti II*, say defendants, "because there is no opportunity for judicial authorization for an abortion to be withheld where a minor is found to be mature and competent to make the decision independently . . . ." *Id.*, at 27.

This Court is unable to subscribe to defendants' reading of the statute. Although the juvenile court is authorized to select one of three alternatives, each of the three is clearly independent of the others, connected in the statute with the disjunctive "or." Alternative (c) permits the court to "deny the petition," guided only by the general standard that such action be "for good cause." Defendants suggest that the legislative intent is clear that the juvenile court may deny the minor's petition *only* if it finds that abortion is not in the best interests of the minor *and* that the minor is not competent to decide for herself. Such an intent is not evident in the statute nor was any such showing made at trial. It is clear to this Court that

alternative (c) authorizes the juvenile court to deny the minor's petition for good cause, but does not require a prior finding that the minor is not sufficiently mature and not competent to make a decision regarding abortion independently.

Defendants alternatively request that the Court abstain from ruling, citing *Bellotti I*. In that case the Supreme Court said that abstention is appropriate if an unconstrued state statute is susceptible to a construction which might avoid the need for federal constitutional adjudication,[19] 428 U.S. at 146-47, 96 S.Ct, 2857, and found that particular statute susceptible to such a construction. It is clear to this Court that section 188.028 is not susceptible to a reasonable construction which would avoid the federal constitutional question controlling in *Bellotti II*. The statute permits the juvenile court to deny the minor's application but does not require that the court first find the minor not competent to make a decision independently. Accordingly, the Court declines to abstain.

The consent procedure in section 188.028 permits judicial authorization for an abortion to be withheld from a minor who is sufficiently mature and competent to make a decision regarding abortion independently, contrary to the ruling in *Bellotti II*. It creates the absolute veto proscribed in *Danforth* and, under that case and *Bellotti II*, is unconstitutional. *Scheinberg* v. *Smith*, 482 F.Supp. 529 (S.D.Fla.1979) (see memorandum opinion accompanying preliminary injunction filed July 13, 1979, *sub nom. Jones* v. *Smith*); *Akron Center for Reproductive Health, Inc.* v. *City of Akron*, 479 F.Supp. 1172 (N.D.Ohio 1979).

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[19] The Court noted that the rule of the Supreme Judicial Court of Massachusetts which permits certification of questions directly to that court for prompt resolution "greatly simplifie[d]" the Court's analysis. There is no such procedure in Missouri.

V.

Abortion After Viability

[6] Section 188.030 regulates abortion in cases in which the fetus has reached viability. In three subsections, the statute prescribes when post-viability abortions may be performed, regulates the abortion technique to be employed, and requires the attendance of a second physician and a specified standard of care. Each subsection will be discussed in turn.

Defendants initially contend that no plaintiff has standing to challenge any part of section 188.030 because no plaintiff presently performs or desires to perform abortions past the stage at which the fetus is viable. Plaintiff Dr. Naim Kassar testified that, in the interests of maternal health, he has performed an abortion as late as approximately twenty-eight weeks gestation. Although the Supreme Court stated that it is not the function of either the legislature or the courts to place viability at a specific point in the gestation period, *Danforth, supra,* 428 U.S. at 64, 96 S.Ct. 2831, the Court noticed in *Roe* that viability usually had been placed at about twenty-eight weeks, but could occur as early as twenty-four weeks. *Roe, supra,* 410 U.S. at 160 93 S.Ct. 705. Enforcement of section 188.030 would have an immediate and direct effect on the medical practice of Dr. Kassar; he therefore has standing to contest its constitutional validity.

Subsection 1 provides that "[n]o abortion of a viable unborn child shall be performed unless necessary to preserve the life or health of the woman" and requires the physician certify in writing that such an abortion is necessary to preserve the life or health of the woman, the medical indications for the abortion, and the probable health consequences. The Act's penalty section mandates criminal liability for "[a]ny person who contrary to the

provisions of [the Act] knowingly performs . . any abortion . . . ." Plaintiffs argue that subsection 1, in conjunction with imposition of criminal liability, is unconstitutionally vague because it sets no standards regarding the determination of viability by the physician. Plaintiffs further argue that the subsection is unconstitutional because it would impose strict criminal liability on a physician for an erroneous, but good faith, determination of fetal nonviability.

In *Colautti* v. *Franklin*, 439 U.S. 379, 99 S.Ct. 675, 58 L.Ed.2d 596 (1979) the Supreme Court ruled on a Pennsylvania statute which provided that "[e]very person who performs or induces an abortion shall prior thereto have made a determination based on his experience, judgment or professional competence that the fetus is not viable, and if the determination is that the fetus is viable or if there is sufficient reason to believe that the fetus may be viable," that the physician exercise a specified standard of care. Plaintiffs in that case argued that the viability determination requirement was unconstitutionally vague because it failed to inform the physician when his duty to the fetus arose and because it did not make the physician's good faith determination of viability conclusive.

The Court held the Pennsylvania viability determination requirement void for vagueness because of a "double ambiguity." The statute set no clear standard regarding the doctor's determination of fetal viability; whether it was to be a purely subjective determination or whether the physician was subject to a mixed subjective and objective standard.

> In other words, it is ambiguous whether there must be "sufficient reason" from the perspective of the judgment, skill, and training of the attending physician, or "sufficient reason" from the perspective of

> a cross-section of the medical community or a panel of experts. The latter, obviously portends not an inconsequential hazard for the typical private practitioner who may not have the skills and technology that are readily available at a teaching hospital or large medical center.

Id., 439 U.S. at 391, 99 S.Ct. at 683, 58 L.Ed.2d at 606-07. Inclusion of the phrase "may be viable" injected a second ambiguity: whether the statute delineated some new time period in a pregnancy during which there might be a remote possibility of viability somewhere short of "viability" itself.

Compounding the vagueness of the statute, said the Court, was the fact that it "subjects the physician to potential criminal liability, without regard to fault." Although the criminal penalty provision did require scienter *with respect to the act of abortion*, there was no requirement of a culpable mental state *regarding the doctor's determination that the fetus is or "may be" viable.*[20]

> Because of the absence of a scienter requirement in the provision directing the physician to determine whether the fetus is or may be viable, the statute is little more than "a trap for those who act in good faith." [citation omitted]

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[20] The Court noted that the statute did provide a subjective standard for the determination of viability, and that it was ambiguous whether that standard also applied to the determination that the fetus "may be viable." However, the application of a subjective standard did not avoid the strict criminal liability issue. "A subjective standard keyed to the physician's individual skill and abilities, however, is different from a requirement that the physician be culpable or blameworthy for his performance under such a standard." *Collautti* v. *Franklin*, 439 U.S. at 395, 99 S.Ct. at 685, 58 L.Ed.2d at 609 n. 12.

The perils of strict criminal liability are particularly acute here because of the uncertainty of the viability determination itself. As the record in this case indicates, a physician determines whether or not a fetus is viable after considering a number of variables: the gestational age of the fetus, derived from the reported menstrual history of the woman; fetal weight, based on an inexact estimate of the size and condition of the uterus; the woman's general health and nutrition; the quality of the available medical facilities; and other factors. Because of the number and the imprecision of these variables, the probability of any particular fetus' obtaining meaningful life outside the womb can be determined only with difficulty. Moreover, the record indicates that even if agreement may be reached on the probability of survival, different physicians equate viability with different probabilities of survival, and some physicians refuse to equate viability with any numerical probability at all. In the face of these uncertainties, it is not unlikely that experts will disagree over whether a particular fetus in the second trimester has advanced to the stage of viability. The prospect of such disagreement, in conjunction with a statute imposing strict civil and criminal liability for an erroneous determination of viability, could have a profound chilling effect on the willingness of physicians to perform abortions near the point of viability in the manner indicated by their best medical judgment.

Id., 439 U.S. at 395, 99 S.Ct. at 685, 58 L.Ed.2d at 609-10. However, because the viability determination requirement was "void on its face," the Court in *Colautti* declined to decide in that case "whether, under a properly drafted statute, a finding of bad faith or some other type of scienter would be required before a physician could be held criminally responsible for an erroneous determination of viability."

The Missouri regulation prohibits the abortion of a viable fetus, with the exception of necessity to preserve the life or health of the woman, and subjects the physician to criminal liability for its violation. Although the penalty provision requires a culpable mental state, "knowingly," regarding the act of abortion, neither the penalty section nor the substantive prohibition contains a culpable mental state requirement regarding the attending physician's necessary determination of fetal viability or nonviability. By its own terms, the statute is absolute. The physician who performs an abortion based on his good faith determination, in the exercise of his best medical judgment, that the fetus is not viable is subject to strict criminal liability if his determination is erroneous, regardless of his state of mind. Thus, the question deferred by the Supreme Court in *Colautti* is presented to this Court.

The record in this case relating to the determination of viability parallels that described by the Court in *Colautti*. The determination by the attending physician whether any particular pregnancy has passed the point of fetal viability is based on a number of variables, none of which is susceptible of precise determination, and is uncertain at best. Further, there is a difference of medical opinion regarding the probability of survival necessary before a fetus may be considered "viable."

The Supreme Court affirmed in *Danforth* that viability is a medical concept involving the judgment of the attending physician and his skill and technical ability, and by its nature is flexible and imprecise, varying with each pregnancy. It is clear to this Court that strict criminal liability attending upon an erroneous determination by a physician that a particular pregnancy had not yet reached the point of viability not only offends due proc-

ess[21] but denies the attending physician presented with a woman whose pregnancy is close to the point of viability "the room he needs to make his best medical judgment." *Doe* v. *Bolton*, 410 U.S. at 192, 93 S.Ct. at 747; *Colautti* v. *Franklin, supra*.[22] Accordingly, the regulation in subsection 1, which incorporates strict criminal liability for an erroneous determination of viability, cannot stand.

[7] Subsection 2 of § 188.030 requires that a physician performing an abortion past the point of viability utilize the abortion technique "most likely to preserve the life and health of the unborn child." The subsection further provides that the physician "may" employ some other abortion technique in cases.

> where the method of technique of abortion which would most likely preserve the life and health of an unborn

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[21] *See Morissette* v. *United States*, 342 U.S. 246, 250, 72 S.Ct. 240, 243, 96 L.Ed.2d. 288 (1952):

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of human will and a consequent ability and duty of the normal individual to choose between good and evil.

In *Holdridge* v. *United States*, 282 F.2d 302, 310 (8th Cir. 1960), then Judge, now Justice, Blackmun described the type of offense in which the absence of a culpable mental state would not offend due process:

> [W]here it seems to involve what is basically a matter of policy, where the standard imposed is, under the circumstances, reasonable and adherence thereto properly expected of a person, where the penalty is relatively small, where conviction does not gravely besmirch. . . .

The penalty provision of the Missouri Abortion Act, § 188.075, RSMo, provides that a violator is guilty of a class A misdemeanor which is punishable by a term of imprisonment not to exceed one year, § 558.-011.1(5), RSMo, and a fine not exceeding $5,000, § 560.021.1(2).

[22] The Supreme Court also noted in *Colautti* that strict criminal liability could have "a profound chilling effect on the willingness of physicians to perform abortions near the point of viability in the manner indicated by their best medical judgment."

> child *would present a greater risk* to the life and health of the woman than another available method or technique. (emphasis added)

The subsection goes on to require in such cases that the performing physician certify in writing the techniques considered and the reasons for choosing the technique actually employed. Plaintiffs argue that subsection 2 is defective for the same reasons as is subsection 1; that it is unconstitutionally vague and that it subjects the physician to criminal liability without a culpable mental state.

The requirements of the subsection are triggered initially by the physician's determination of fetal viability. The physician is then called upon to determine which abortion technique is "most likely to preserve the life and health" of the fetus. The physician also must decide whether that technique mandated by the statute presents a "greater risk to the life and health of the woman" than some other abortion technique. These medical decisions and others of the same nature are a fundamental part of the daily practice of medical doctors; they have been and will be made every day, completely aside from this statutory requirement. Because of the nature of the science and art of medical practice, these determinations are often uncertain and difficult to make. Experts may, and often do, disagree on their resolution, both in specific cases and as general propositions.[23] Through the penalty provision, subsection 2 imposes strict liability for an

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[23] This record contains conflicting testimony from medical experts regarding the relative safety to the woman and to the fetus of various post-first trimester abortion techniques.

Testimony of Drs. Allen Palmer, Naim Kassar, Robert Crist, and Bernard Nathanson. *See Colautti* v. *Franklin*, 439 U.S. at 401, 99 S.Ct. at 688, 58 L.Ed.2d at 612: "The choice of an appropriate abortion technique, as the record in this case so amply demonstrates, is a complex medical judgment about which experts can—and do—disagree."

error in *any* of the above medical decisions, regardless of the physician's state of mind. For the reasons discussed in relation to subsection 1, the Court also finds subsection 2 to be contitutionally deficient. *See Colautti* v. *Franklin, supra.*

[8, 9] Subsection 2 also suffers from the vagueness fatal to the Pennsylvania statute considered by the Supreme Court in *Colautti.* Although the first sentence of subsection 2 mandates utilization of the abortion technique most favorable to the life and health of the fetus, the second sentence informs the doctor that he "may" use another technique, if that prescribed in the first sentence presents "a greater risk to the life and health of the woman" than some other technique. In this case, and as noted by the Supreme Court in *Colautti,* 439 U.S. at 400, 99 S.Ct. at 688, 58 L.Ed.2d at 612:

> it is uncertain whether the statute permits the physician to consider his duty to the patient to be paramount to his duty to the fetus, or whether it requires the physician to make a "trade-off" between the woman's health and additional percentage points of fetal survival. Serious ethical and constitutional difficulties, that we do not address, lurk behind this ambiguity. We hold only that where conflicting duties of this magnitude are involved, the State, at the least, must proceed with greater precision before it may subject a physician to possible criminal sanctions.

The difficulties noted by the Supreme Court are present in subsection 2. The lack of a culpable mental state requirement compounds the uncertainty. *Colautti* v. *Franklin, supra.*[24]

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[24] Defendants contend that the intent of the subsection is clearly not to require that the life of the fetus be favored over the life of the mother, and alternatively urge abstention in favor of a construction of

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[10] Subsection 3 requires the attendance of a second physician at any abortion performed past the point of viability, "who shall take control of and provide immediate medical care for a child born as a result of the abortion." It also prescribes a standard of care to be exercised by both physicians:

> [They] shall take all reasonable steps in keeping with good medical practice, consistent with the procedure used, to preserve the life and health of the viable unborn child; provided that it does not pose an increased risk to the life or health of the woman.

As with the two previous subsections, the Act's penalty provision imposes criminal liability on the physician who performs an abortion in violation of the regulation due to an erroneous determination of nonviability, without regard to the doctor's mental state. For the reasons dis-

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Footnote continued
the provision by the courts of Missouri should this Court find otherwise, citing *Bellotti I*. The judge-made doctrine of abstention, *see Railroad Commission* v. *Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed.2d 971 (1941), is appropriate in a case in which a challenged state statute is susceptible to a construction by the state judiciary that would avoid or modify the necessity of reaching a federal constitutional question. *Zwickler* v. *Koota*, 389 U.S. 241, 88 S.Ct. 391, 19 L.Ed.2d 444 (1967). On the other hand, if it cannot be fairly concluded that the statute can be reasonably construed so as to avoid the necessity for federal constitutional adjudication, abstention is inappropriate and would amount to a shirking of the responsibilities of the federal courts. *Kusper* v. *Pontikes*, 414 U.S. 51, 94 S.Ct. 303, 38 L.Ed.2d 260 (1973). Because subsection 2 of § 188.030 is defective due to the absence of a culpable mental state requirement, the Court is not convinced that resolution of the vagueness issue, *i. e.*, whether the duty of the physician to his female patient is paramount to the physician's duty to preserve the life and health of the fetus, by a definitive interpretation of the subsection by the Missouri courts would avoid eventual federal constitutional adjudication. The court again notes that there is no procedure to certify questions for prompt resolution to the Missouri Supreme Court. *See Bellotti I*, 428 U.S. at 150-51, 96 S.Ct. 2857.

cussed above, the Court finds this imposition of strict criminal liability with regard to a medical judgment unconstitutional.

[11, 12] The requirement of a second physician is also overbroad. The record shows that dilatation and evacuation may be the procedure of choice, even after viability, in cases in which there are positive contraindications to use of saline or prostaglandins instillation.[25] The experts agreed that D & E carries no chance of fetal survival. The Supreme Court has held that legislative enactments in this area involving fundamental rights "must be narrowly drawn to express only the legitimate state interests at stake." *Roe* v. *Wade*, 410 U.S. at 155, 93 S.Ct. at 728; *Carey* v. *Population Services International*, 431 U.S. 678, 97 S.Ct. 2010, 52 L.Ed.2d 675 (1977). The state has an important and legitimate interest in potential life and may regulate abortion after viability to preserve the life and health of the fetus. *Roe* v. *Wade*, *supra*. Although the presence of a second physician to care for the child born as a result of a post-viability abortion certainly may further the state's interest in the protection of potential life, the attendance of a second physician during an abortion procedure which holds no possibility of fetal survival does not further that interest. The two-physician regulation is therefore overboard and invalid on that basis.

VI.

Informed Consent

[13] Section 188.039 prescribes a procedure to be followed by the woman's physician to secure and document her informed consent to the abortion. The physician must certify: (1) that he informed the woman of the informa-

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[25] Testimony of Drs. Robert Crist (for plaintiffs) and Richard Schmidt (for defendants).

tion specified in the statute not less than forty-eight hours prior to her giving her consent to the abortion; (2) if the woman is a minor, that he also provided her parent, legal guardian, or person standing in loco parentis the same information; and (3) the woman's age, based on "proof of age" provided by her. The woman must sign a consent form to acknowledge that she has been informed by the attending physician of the following:

> (1) That according to the best medical judgment of her attending physician she is pregnant;
>
> (2) The number of weeks elapsed from the probable time of conception of her unborn child, based upon the information provided by her as to the time of her last menstrual period and after a history and physical examination and appropriate laboratory tests;
>
> (3) The probable anatomical and physiological characteristics of the unborn child at the time the abortion is to be performed;
>
> (4) The immediate and long-term physical dangers of abortion and psychological trauma resulting from abortion and any increased incidence of premature births, tubal pregnancies and still births following abortion;
>
> (5) The particular risks associated with the abortion technique to be used;
>
> (6) Alternatives to abortion shall be given by the attenting physician, including a list of public and private agencies and services that will assist her during her pregnancy and after the birth of her child.

The section further provides that the physician may inform the woman of "other material facts or opinions"

which may be necessary to allow the woman to be fully informed of the nature and consequences of an abortion.

Plaintiffs contend that the section's requirement that the information be given by the attending physician, rather than some other person, is unduly burdensome. At the clinic of plaintiff Reproductive Health Services, information relating to the woman's informed consent to an abortion, including much of the information required by the statute, is presented through an "informed consent" videotape of a doctor discussing the abortion procedure and through sessions with lay counselors, and does not come directly from the physician who actually performs the abortion procedure. Plaintiffs claim that this system was devised as the most efficient and economical method of delivery of this particular medical service and that it would be disrupted if the attending physician had to spend more time with each patient than is presently the practice, thereby increasing the cost of each procedure.[26] An

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[26] Testimony of Judith Widdicombe, R. N., Executive Director of Reproductive Health Services. Ms. Widdicombe estimated that the cost per procedure would increase by $70 if the attending physician were required to spend an additional 30 minutes with each patient.

Plaintiffs also argue that this requirement, in conjunction with the 48 hour waiting period, could result in delays of substantially more than 48 hours. Physicians perform abortions at Reproductive Health Services' clinic on a part-time basis, perhaps one afternoon per week. If the physician must give information to each patient on whom he performs an abortion 48 hours prior to the procedure, say plaintiffs, delays of one week or more would result, simply because the doctor would not be present at the clinic for at least a week after the initial session with the patient. Plaintiffs argue that the patient's personal schedule might delay the procedure even longer if she could not arrange to come to the clinic on the day on which the physician who presented the information to her was in attendance. The Court notes that plaintiffs have made a showing that the combination of a mandatory waiting period with the requirement that certain information be conveyed by the physician who actually performs the abortion

(Continued on next page)

effect of the requirement will be that the doctor who performs the abortion may have to spend more time with each patient than is currently the practice in plaintiffs' clinics. This may result in increased costs, although the additional expense to the patient will certainly depend on the amount of information required to be present directly by the physician and the actual time required by a particular physician to convey it. On this record, the Court is not convinced that the requirement that information important to the woman's decision to have an abortion come directly from the attending physician is an undue burden on her decision to abort or her obtaining an abortion.[27] The Supreme Court has emphasized the participation and responsibility of the woman's physician regarding the decision to have an abortion and has noted the legitimacy of the state's interest that she make the decision with full knowledge of its nature and consequences. *Planned Parenthood* v. *Danforth, supra.* A requirement that the attending physician personally provide information regarding the abortion decision furthers that interest and is not unconstitutional.[28]

[14] Plaintiffs challenge the forty-eight hour waiting

Footnote continued

would present a practical problem to plaintiff's clinics, one result of which could be significant delay between the woman's initial visit and the abortion itself. The 48 hour waiting period has been stricken as an unconstitutional burden on obtaining an abortion.

[27] Testimony regarding the time necessary for a physician to present *all* of the information specified in the statute ranged from 15 minutes to an hour and a half. Some items specified in the section have been stricken as unconstitutional.

It is conceivable that a regulation might require a presentation by the attending physician so lengthy as to become unduly burdensome, although such a finding is not supported by this record.

[28] *See Akron Center for Reproductive Health, Inc.* v. *City of Akron,* 479 F.Supp. 1172 (N.D. Ohio 1979); *Women's Community Health Center, Inc.* v. *Cohen,* 477 F.Supp. 542 (D.Me. 1979).

period as an undue burden on the abortion decision which actually increases the risk to the woman's health. The experts seem to be in accord that the length of gestation at the time of abortion is directly related to the risk presented by the procedure to the woman's life and health, the risk increasing the later an abortion is performed.[29] The Court is convinced that the forty-eight hour delay imposed by the statute would have, in the words of plaintiffs' expert, a "significant health impact" on a woman seeking an abortion.[30] There was additional testimony that a mandatory forty-eight hour waiting period could have the effect of a much longer delay due to the nature of physicians' working schedules.[31] The record shows that such delay has a disproportionate impact on minors, who generally seek abortions at a later stage of pregnancy.[32]

Defendants argue that the waiting period is designed to ensure that the abortion decision is made with "adequate reflection and consideration," and as such furthers the state's interest in maternal health. However, there was expert testimony at trial which indicated that, as a general proposition, women seeking abortions have completely

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[29] Within the first 12 weeks, the main risk to a woman who wants an abortion results from delay.

. . . . .

Our findings clearly demonstrate that *any* delay increases the risk of complications to a pregnant woman who wishes an abortion. (emphasis in original)

Willard Cates, Jr., et al., *The Effect of Delay and Method Choice on the Risk of Abortion Morbidity*, 9 Family Planning Perspectives 266, 267-68 (1977) (reprinted by Public Health Service, U.S. Dep't of H.E.W.)

[30] Testimony of Dr. Robert Crist.

[31] Testimony of Drs. Allen Palmer and Robert Kretzschmar. *See* note 26, *supra*.

[32] Testimony of Drs. Enrique Vera, Robert Kretzschmar, Grace Ketterman, and Dr. Elizabeth Smith. *See* note 15, *supra*.

thought out the abortion decision prior to approaching a clinic or personal doctor.[33]

The forty-eight hour waiting period requires that a woman make a minimum of two visits to her physician or to a clinic. This requirement involves additional time and expense and, for women living outside the metropolitan areas, may require additional travel or subsistence expense during the delay.

This Court concludes that the mandatory forty-eight hour waiting period has, in fact, a detrimental effect on the health interests of women seeking abortions and therefore lacks a rational relation with any legitimate state interest. Moreover, the mandatory waiting period is unduly burdensome to women seeking abortions. *Bellotti I. supra.* For both reasons, the mandatory forty-eight hour waiting period is unconstitutional.[34]

[15] Plaintiffs claim that the requirement that the physician certify the woman's age based upon "proof of age offered by her" is void for vagueness. The Court cannot agree. A physician's good faith certification of a woman's age based on as little proof as the woman's own declaration or written statement of her age would satisfy the statute. There is no constitutional infirmity.

[16] In the case of a minor, subsection 2 requires that not only she but also "her parent or legal guardian or person standing in loco parentis" be informed of specified

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[33] Testimony of Dr. Enrique Vera.

[34] *Accord, Womens Services, P.C.* v. *Thone,* 483 F.Supp. 1022 (D.Neb. 1979) (48 hours); *Women's Community Health Center, Inc.* v. *Cohen,* 477 F.Supp. 542 (D.Me. 1979) (48 hours); *Leigh* v. *Olson,* No. A3-79-78 (D.N.D. preliminary injunction filed July 9, 1979) (48 hours); *But see Wolfe* v. *Schroering,* 541 F.2d 523 (6th Cir. 1976) (24 hours). (no argument that delay "significantly burdens the abortion process"); *Akron Center for Reproductive Health, Inc.* v. *City of Akron,* 479 F.Supp. 1172 (N.D.Ohio 1979) (24 hours).

information by the attending physician before she may obtain an abortion. The Court agrees with plaintiffs' contention that this regulation constitutes an undue burden on a minor seeking an abortion. The subsection makes no distinction between a minor still living in her parents' home and an emancipated minor who might be living independently and at some distance from her parents or guardian. The requirement contains no exception, for instance, for parents who may be difficult to contact or who may live thousands of miles from the location of the attending physician. It does not provide that absent parents or parents impossible to contact may be informed constructively. As written in this subsection, the requirement that parents or guardian be informed prior to a minor obtaining an abortion could inject substantial delay into the process and, in some cases, could constitute an insurmountable obstacle. It is unconstitutional as an undue burden on a minor seeking an abortion.

[17] Plaintiffs' remaining objections to section 188.039 concern the specific information required to be presented by the attending physician to every woman seeking an abortion. This regulation to ensure "truly informed consent" must be considered in light of *Planned Parenthood* v. *Danforth*, in which the Supreme Court upheld a prior Missouri requirement that the woman give "informed" consent in writing. Answering a vagueness challenge to the term "informed," the Court stated, 428 U.S. at 67 n.8, 96 S.Ct. at 2840:

> [w]e are inclined to accept, as the meaning [of "informed" consent], the giving of information to the patient as to just what would be done and as to its consequences. To ascribe more meaning than this might well confine the attending physician in an undesired and uncomfortable straitjacket in the practice of his profession.

The Eighth Circuit interpreted that statement in *Freiman* v. *Ashcroft*, 584 F.2d 247, 251 (8th Cir. 1978), *summarily aff'd*, 440 U.S. 941, 99 S.Ct. 1416, 59 L.Ed.2d 630 (1979). "[T]he Supreme Court did not hold that a state may require physicians to provide to each patient any and all information required by the state, regardless of its legality, truth, constitutionality or medical advisability." The state has a legitimate interest in protecting women by ensuring that the decision to have an abortion is made with knowledge of the nature and consequences of the abortion procedure. *Planned Parenthood* v. *Danforth*, *supra*. However, specific regulations in this area may not, consistent with the reasoning in *Danforth*, have a "straitjacket" effect on the attending physician. There is a danger that specific information requirements may force the physician to do something *other* than what he considers to be best for his patient.[35]

The first two items require the physician to inform the woman "[t]hat according to the best medical judgment of her attending physician she is pregnant," and "[t]he number of weeks elapsed from the probable time of conception . . . ." Both plaintiffs' and defendants' experts testified that, apart from the statute, presenting such information to the patient seeking an abortion is good medical practice and would be done as a matter of course in almost all abortion cases. It is the exception which underlies plaintiffs' constitutional objection to these items.

[18] The procedure known as menstrual extraction is the removal of uterine contents prior to a positive pregnancy test. The purpose of the procedure is to correct a menstrual disorder and/or to abort a very early preg-

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[35] Testimony of Dr. Enrique Vera.

nancy.[36] At the stage at which the procedure is done it is not presently possible to determine whether the woman is in fact pregnant;[37] in practice the procedure is done with disregard to that question.[38] A menstrual extraction is intended to and in many cases does result in an abortion. Because the statute requires the physician to tell his patient that she *is* pregnant[39] and the length of her pregnancy prior to performing an abortion, a menstrual extraction performed prior to a positive pregnancy test and resulting in an abortion is unlawful. This could cause a woman seeking an early abortion to wait until such time as current technology enabled her physician to determine that she is in fact pregnant. A regulation which has the effect of outlawing a safe abortion technique utilized in the very early stages of pregnancy does not survive even rational basis inquiry.[40]

[19] The physician also is required to relate to every woman who seeks an abortion the "probable anatomical and physiological characteristics of the unborn child at the time the abortion is to be performed" and the "immediate and long-term physical dangers of abortion and psychological trauma resulting from abortion and any increased

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[36] Dr. Robert Crist estimated that, within a reasonable medical certainty, 85% of those women with a menstrual period 10 days late are, in fact, pregnant.

[37] Testimony of Drs. Allen Palmer, Robert Crist, Robert Kretzschmar, and Richard Schmidt. There is nothing in this record to indicate the existence of a reliable pregnancy test at this early stage of pregnancy.

[38] Testimony of Dr. Allen Palmer.

[39] The statute does not require the physician to tell his patient *whether* she is pregnant; it requires the affirmative statement that she *is* pregnant.

[40] *Contra, Planned Parenthood* v. *Fitzpatrick*, 401 F.Supp. 554 (E.D.Pa. 1975), *summarily aff'd sub nom. Franklin* v. *Fitzpatrick*, 428 U.S. 901, 96 S.Ct. 3202, 49 L.Ed.2d 1205 (1976) (this issue was not part of that appeal).

incidence of premature births, tubal pregnancies and still births following abortion." From the testimony and other evidence presented at trial, the Court concludes that these two items constitute an impermissible intrusion into the privacy of the doctor-patient relationship and interfere with the right of a woman to consult with her physician regarding abortion free from state interference.[41]

It is clear that many physicians believe that a mandatory presentation on fetal anatomy and physiology is not in the best health interests of many, if not all, of their patients seeking abortions. There was evidence that most women seeking an abortion do not desire such anatomical information[42] and that the giving of such information may have adverse effects in the form of emotional tension, increased anxiety and fright.[43] It is also clear that many physicians believe that there are no longterm physical or psychological effects of abortion or are unaware of such effects.[44] It is certainly not for this Court to say whether such long-term dangers actually exist. It is sufficient to note that the evidence demonstrates that many physicians believe that such information is highly debatable or is simply not factual, based on present medical knowledge.

It is evident that such physicians, in the exercise of

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[41] Plaintiffs also make a strong argument that the requirement that the physician relate the "probable anatomical and physiological characteristics" of the fetus, enforced by criminal sanctions, is void for vagueness.

[42] Testimony of Dr. Robert Kretzschmar and Dr. Elizabeth Smith.

[43] Testimony of Drs. Allen Palmer, Robert Crist, Naim Kassar, and Enrique Vera. These experts also testified that such adverse emotional effects may require use of anesthetics in greater amounts, thereby increasing risk to the woman's health.

[44] Testimony of Drs. Allen Palmer, Naim Kassar, Robert Crist, and Robert Kretzschmar. Dr. Richard Dickey testified to the contrary, that induced abortion may carry a risk to the woman's future fertility and may cause a greater likelihood of spontaneous abortion (miscarriage) in subsequent pregnancies.

their best medical judgment, would choose not to provide their patients seeking abortions with a detailed anatomical description of the fetus. It is also evident that such physicians would choose not to provide information regarding long-term dangers they believe not to exist. These two requirements impose the "straitjacket" foreseen in *Planned Parenthood* v. *Danforth*. They mandate what must be presented by the physician *to each and every patient*, regardless of the doctor's view on the subject or his professional opinion of the medical advisability of presenting such information in any particular case. These requirements deprive the woman seeking an abortion of the right to consult with her physician and rely on his discretion and professional judgment. *Roe* v. *Wade, supra*.[45]

[20-22] The final two items required to be presented to the woman seeking an abortion are "[t]he particular risks associated with the abortion technique to be used" and the "alternatives to abortion," including "a list of public and private agencies and services that will assist her during her pregnancy and after the birth of her child." Information regarding the risks associated with the technique to be employed and the alternatives available to the woman may be required by the state to ensure informed consent consistent with *Planned Parenthood* v. *Danforth*. *See Hodgson* v. *Lawson*, 542 F.2d 1350 (8th Cir. 1976); *Women's Services, P.C.* v. *Thone*, ____ F.Supp. ____ (D.Neb. 1979). However, the requirement that the attending physician provide each of his patients with "a list of agencies" is void for vagueness. It is revealing to consider

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[45] *See Freiman* v. *Ashcroft*, 584 F.2d 247 (8th Cir. 1978), *summarily aff'd*, 440 U.S. 941, 99 S.Ct. 1416, 59 L.Ed.2d 630 (1979); *Women's Services, P.C.* v. *Thone*, 483 F.Supp. 1022 (D.Neb. 1979); *Akron Center for Reproductive Health, Inc.* v. *City of Akron*, 479 F.Supp. 1172 (N.D.Ohio 1979); *Leigh* v. *Olson*, No. A3-79-78 (D.N.D. preliminary injunction filed July 9, 1979).

the range of testimony of both sides' experts describing the list which is required to be furnished, at the risk of criminal liability for non-compliance: "a list of *all* such agencies (there may be several hundred)"; "it is impossible to compile a complete list"; "it would include every agency in the metropolitan area"; "it would include only one public and one private agency"; "it would include only those agencies of which the physician was personally aware." A criminal statute which fails to give a person of ordinary intelligence fair notice of what is required or proscribed is unconstitutionally vague. *United States* v. *Harriss*, 347 U.S. 612, 617, 74 S.Ct. 808, 98 L.Ed. 989 (1954). The Court finds that the "list of agencies" requirement fails to provide physicians with the fair notice that is constitutionally required.

[23] The Court finds that the Missouri General Assembly would have enacted those parts of section 188.039 not declared unconstitutional independently from the stricken portions, and further finds that the valid provisions are not so connected and so dependent upon the stricken provisions as to preclude that finding. Accordingly, the provisions declared to be unconstitutional will be severed and stricken, allowing the remainder of the section to stand.[46] *See* § 1.140, RSMo; *United States* v. *Jackson*, 390 U.S. 570, 585, 88 S.Ct. 1209, 20 L.Ed.2d 138 (1968).

VII.

Pathology Report

[24] Section 188.047 requires that a sample of the tissue removed at the time of abortion be submitted to a path-

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[46] Of course, the reference in § 188.039.1 to "the information contained in subsection 2 of this section" may refer constitutionally only to those portions of subsection 2 not declared invalid.

ologist, who must file copies of the tissue report with the facility at which the abortion is performed and with the state division of health. Plaintiffs contend that the additional cost of a tissue examination is unduly burdensome and that the requirement of an exaxmination by a pathologist in every abortion case cannot be justified under traditional medical cost/benefit analysis; that such an examination in every case is simply unnecessary and serves no rational purpose.[47] The Court has not been shown that the increase in cost per abortion procedure resulting from the required tissue examination will constitute an undue burden on a woman seeking an abortion.[48] Defendants argue that the required tissue examination furthers the state's legitimate interest in the maintenance of good medical standards. In spite of plaintiffs' contentions that the tissue examination required by the statute is duplicative and not justifiable as a procedure to be done in every case, this Court cannot say that such a required examination is not rationally related to a legitimate state interest in the standard of medical care provided its citizens who undergo abortions.[49] The section is not unconstitutional. *See Wynn* v. *Scott*, 449 F.Supp. 1302, 1322 (N.D.Ill. 1978), *aff'd*, 599 F.2d 193 (7th Cir. 1979).

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[47] Plaintiff physicians testified that a gross or macroscopic examination of the tissue removed during abortion is done in any event by the performing physician, who then decides whether examination by a pathologist is indicated. Ms. Widdicombe testified that a tissue examination by a pathologist is ordered in only 12% of abortion cases at Reproductive Health Services' clinic.

[48] The expert's testimony regarding the cost per patient of a required tissue examination by a pathologist ranged from $10 to $40. Ms. Widdicombe's estimate of the cost of compliance for plaintiff Reproductive Health Services was $19.40 per abortion procedure.

[49] Several of defendants' medical experts testified that pathology should be done in every case of abortion. Testimony of Drs. Bernard Nathanson, Pierre Keitges, Richard Schmidt, and Daniel Martin.

VIII.

Reporting Requirements

[25] Section 188.052 imposes recordkeeping and reporting obligations regarding the abortion procedure itself and the treatment of any resulting complications.[50] The Court finds the requirements contained in this section to be consistent with the holding in *Planned Parenthood* v. *Danforth* and therefore constitutional. *See Hodgson* v. *Lawson*, 542 F.2d 1350 (8th Cir. 1976). As did the Supreme Court in *Danforth*, this Court relies on the assumption that such regulations will not be utilized and enforced in such a way as to constitute an undue burden through the sheer volume of recordkeeping.

IX.

Regulation of Abortion-Related Counseling

[26] Section 188.063 regulates counseling services relating to abortion. It sets minimum standards of education and training for counselors and regulates the content of counseling offered to pregnant women by requiring discussion of specified topics. The Court need not look beyond plaintiffs' equal protection argument.[51] By its own terms, the section applies only to an "abortion facility." The Act defines "abortion facility" as "a clinic, physician's office, or any other place or facility in which abortions are performed *other than a hospital.*"

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[50] Section 188.055 provides that all recordkeeping and reporting required under the Act shall be confidential and used only for statistical purposes.

[51] Plaintiffs make a compelling argument that the section is also void for vagueness because it involves the imposition of criminal liability for behavior to be measured by vague statutory standards, *e. g.*, "appropriate field," "factual information," "not to be misleading," "explicit discussion," and "thorough discussion."

§ 188.015(2), RSMo (the Court's emphasis). Thus, the section regulates counseling services relating to abortion offered in clinics, such as those operated by the corporate plaintiffs, but leaves the same services unregulated if offered in a hospital. Defendants offer no justification, either related to the purpose of the regulation or otherwise, for such differences in treatment. With respect to abortion-related counseling services, the Court finds no rational reason for the distinction between hospitals and abortion facilities other than hospitals. The section is unconstitutional as violative of the equal protection clause of the fourteenth amendment of the Constitution.

X.

Conclusion

For the reasons above-stated, the following portions of the 1979 Missouri act relating to the regulation of abortions are hereby declared to be unconstitutional:

1. § 188.025;

2. § 188.028;

3. § 188.030;

4. The following portions of § 188.039:

   A. From § 188.039.1, the phrase "not less than forty-eight hours prior to her consent to the abortion,";

   B. From § 188.039.2, the phrase "and, if she is a minor, her parent or legal guardian or person standing in loco parentis";

   C. § 188.039.2(1)-(4);

   D. From § 188.039.2(6), the phrase "including a list of public and private agencies and services

that will assist her during her pregnancy and after the birth of her child."

5. § 188.063.

[27] At the conclusion of trial, defendants stated on the record that they will abide by this Court's declaration regarding the validity of any part of the Act. The Court assumes that all prosecutorial authorities of the State of Missouri will likewise abide by this Court's judgment. Accordingly, no injunctive order will issue at this time.

IT IS SO ORDERED.

APPENDIX

AN ACT to repeal sections 188.015, 188.020, 188.025, 188.030, 188.035, 188.050, 188.055, 188.060, and 188.075, RSMo 1978, relating to regulation of abortions, and to enact in lieu thereof fifteen new sections relating to the same subject, with penalty provisions and an emergency clause.

Be it enacted by the General Assembly of the State of Missouri, as follows:

Section 1. Sections 188.015, 188.020, 188.025, 188.030, 188.035, 188.050, 188.055, 188.060 and 188.075, RSMo 1978 are repealed and fifteen new sections enacted in lieu thereof, to be known as sections 188.015, 188.020, 188.025, 188.027, 188.028, 188.030, 188.035, 188.037, 188.039, 188.047, 188.052, 188.055, 188.060, 188.063 and 188.075 to read as follows:

188.015. Unless the language or context clearly indicates a different meaning is intended, the following words or phrases for the purposes of sections 188.010 to 188.085 shall be given the meaning ascribed to them:

(1) "Abortion", the intentional destruction of the life of an embryo or fetus in his or her mother's womb or the intentional termination of the pregnancy of a mother with an intention other than to increase the probability of a live birth or to remove a dead or dying unborn child;

(2) "Abortion facility", a clinic, physician's office, or any other place of facility in which abortions are performed other than a hospital;

(3) "Conception", the fertilization of the ovum of a female by the sperm of a male;

(4) "Physician", any person licensed to practice

medicine in this state by the state board of registration of the healing arts;

(5) "Unborn child", the offspring of human beings from the moment of conception until birth and at every stage of its biological development, including the human conceptus, zygote, morula, blastocyst, embryo, and fetus;

(6) "Viability", that stage of fetal development when the life of the unborn child may be continued indefinitely outside the womb by natural or artificial life-supportive systems.

188.020. No person shall perform or induce an abortion except a physician.

188.025. Every abortion performed subsequent to the first twelve weeks of pregnancy shall be performed in a hospital.

188.027. No abortion shall be performed except with the prior, informed and written consent freely given of the pregnant woman.

188.028. 1. No person shall knowingly perform an abortion upon a pregnant woman under the age of eighteen years unless:

(1) The attending physician has secured the informed written consent of the minor and one parent or guardian; or

(2) The minor is emancipated and the attending physician has received the informed written consent of the minor; or

(3) The minor has been granted the right to self-consent to the abortion by court order pursuant to subsection 2 of this section, and the attending physician has received the informed written consent of the minor; or

(4) The minor has been granted consent to the abortion by court order, and the court has given its informed written consent in accordance with subsection 2 of this section, and the minor is having the abortion willingly, in compliance with subsection 3 of this section.

2. The right of a minor to self-consent to an abortion under subdivision (3) of subsection 1 of this section or court consent under subdivision (4) of subsection 1 of this section may be granted by a court pursuant to the following procedures:

(1) The minor or next friend shall make an application to the juvenile court which shall assist the minor or next friend in preparing the petition and notices required pursuant to this section. The minor or the next friend of the minor shall thereafter file a petition setting forth the initials of the minor; the age of the minor; the names and addresses of each parent, guardian, or, if the minor's parents are deceased and no guardian has been appointed, any other person standing in loco parentis of the minor; that the minor has been fully informed of the risks and consequences of the abortion; that the minor is of sound mind and has sufficient intellectual capacity to consent to the abortion; that, if the court does not grant the minor majority rights for the purpose of consent to the abortion, the court should find that the abortion is in the best interest of the minor and give judicial consent to the abortion; that the court should appoint a guardian ad litem of the child; and if the minor does not have private counsel, that the court should appoint counsel. The petition shall be signed by the minor or the next friend;

(2) Copies of the petition and a notice of the date, time, and place of the hearing shall be personally served upon each parent, guardian or, if the minor's parents are deceased and no guardian has been appointed, any other

person standing in loco parentis of the minor listed in the petition by the sheriff or his deputy. If a parent or guardian or, if the minor's parents are deceased and no guardian has been appointed, any other person standing in loco parentis cannot be personally served within two days after reasonable effort, the sheriff or his deputy shall give constructive notice to them by certified mail to their last known address and the hearing shall not be held for at least forty-eight hours from the time of the mailing. In any case where there exists the potential or appearance of conflict of interests between the parents or guardian or next friend of the child and the child, the court shall appoint a guardian ad litem to defend the minor's interests. The court shall set forth, for the record, the grounds for such appointment;

(3) A hearing on the merits of the petition, to be held on the record, shall be held as soon as possible within five days of the filing of the petition. If any party is unable to afford counsel, the court shall appoint counsel at least twenty-four hours before the time of the hearing. At the hearing, the court shall hear evidence relating to the emotional development, maturity, intellect and understanding of the minor; the nature, possible consequences, and alternatives to the abortion; and any other evidence that the court may find useful in determining whether the minor should be granted majority rights for the purpose of consenting to the abortion or whether the abortion is in the best interests of the minor;

(4) In the decree, the court shall for good cause:

(a) Grant the petition for majority rights for the purpose of consenting to the abortion; or

(b) Find the abortion to be in the best interests of the minor and give judicial consent to the abortion, setting forth the grounds for so finding; or

(c) Deny the petition, setting forth the grounds on which the petition is denied;

(5) If the petition is allowed, the informed consent of the minor, pursuant to the court grant of majority rights, or the judicial consent, shall bar an action by the parents or guardian of the minor on the grounds of battery of the minor by those performing the abortion. The immunity granted shall only extend to the performance of the abortion in accordance herewith and any necessary accompanying services which are performed in a competent manner. The costs of the action shall be borne by the parties.

(6) An appeal from an order issued under the provisions of this section may be taken to the court of appeals of this state by the minor or by a parent or guardian of the minor. The notice of intent to appeal shall be given within twenty-four hours from the date of issuance of the order. The record on appeal shall be completed and the appeal shall be perfected within five days from the filing of notice to appeal. Because time may be of the essence regarding the performance of the abortion, the supreme court of this state shall, by court rule, provide for expedited appellate review of cases appealed under this section.

3. If a minor desires an abortion, then she shall be orally informed of and, if possible, sign the written consent required by section 188.039 in the same manner as an adult person. No abortion shall be performed on any minor against her will, except that an abortion may be performed against the will of the minor pursuant to the court order described in subdivision (4) of subsection 1 of this section that the abortion is necessary to preserve the life of the minor.

188.030.1. No abortion of a viable unborn child shall be performed unless necessary to preserve the life or

health of the woman. Before a physician may perform an abortion upon a pregnant woman after such time as her unborn child has become viable, such physician shall first certify in writing that the abortion is necessary to preserve the life or health of the woman and shall further certify in writing the medical indications for such abortion and the probable health consequences.

2. Any physician who performs an abortion upon a woman carrying a viable unborn child shall utilize the available method or technique of abortion most likely to preserve the life and health of the unborn child. In cases where the method or technique of abortion which would most likely preserve the life and health of the unborn child would present a greater risk to the life and health of the woman than another available method or technique, the physician may utilize such other method or technique. In all cases where the physician performs an abortion upon a viable unborn child, the physician shall certify in writing the available method or techniques considered and the reasons for choosing the method or technique employed.

3. An abortion of a viable unborn child shall be performed or induced only when there is in attendance a physician other than the physician performing or inducing the abortion who shall take control of and provide immediate medical care for a child born as a result of the abortion. During the performance of the abortion, the physician performing it, and subsequent to the abortion, the physician required by this section to be in attendance, shall take all reasonable steps in keeping with good medical practice, consistent with the procedure used, to preserve the life and health of the viable unborn child; provided that it does not pose an increased risk to the life or health of the woman .

188.035. Whoever, with intent to do so, shall take the

life of a child aborted alive, shall be guilty of murder of the second degree.

188.037. No person shall use any fetus or child aborted alive for any type of scientific, research, laboratory or other kind of experimentation either prior to or subsequent to any abortion procedure except as necessary to protect or preserve the life and health of such fetus or child aborted alive.

188.039. 1. No physician shall perform an abortion unless prior to such abortion, the physician certifies in writing that the woman gave her informed consent, freely and without coercion, after the attending physician had informed her of the information contained in subsection 2 of this section not less than forty-eight hours prior to her consent to the abortion, and shall further certify in writing the pregnant woman's age, based upon proof of age offered by her.

2. In order to insure that the consent for an abortion is truly informed consent, no abortion shall be performed or induced upon a pregnant woman unless she has signed a consent form that shall be supplied by the state division of health, acknowledging that she and, if she is a minor, her parent or legal guardian or person standing in loco parentis have been informed by the attending physician of the following facts:

(1) That according to the best medical judgment of her attending physician she is pregnant;

(2) The number of weeks elapsed form the probable time of conception of her unborn child, based upon the information provided by her as to the time of her last menstrual period and after a history and physical examination and appropriate laboratory tests;

(3) The probable anatomical and physiological characteristics of the unborn child at the time the abortion is to be performed;

(4) The immediate and long-term physical dangers of abortion and psychological trauma resulting from abortion and any increased incidence of premature births, tubal pregnancies and still births following abortion;

(5) The particular risks associated with the abortion technique to be used;

(6) Alternatives to abortion shall be given by the attending physician, including a list of public and private agencies and services that will assist her during her pregnancy and after the birth of her child.

3. The physician may inform the woman of any other material facts or opinions, or provide any explanation of the above information which, in the exercise of his best medical judgment, is reasonable necessary to allow the woman to give her informed consent to the proposed abortion, with full knowledge of its nature and consequences.

188.047. A representative sample of tissue removed at the time of abortion shall be submitted to board eligible or certified pathologist, who shall file a copy of the tissue report with the state division of health, and who shall provide a copy of the report to the abortion facility or hospital in which the abortion was performed or induced and the pathologist's report shall be made a part of the patient's permanent record.

188.052. 1. An individual abortion report for each abortion performed or induced upon a woman shall be completed by her attending physician.

2. An individual complication report for any post-abortion care performed upon a woman shall be completed

by the physician providing such post-abortion care. This report shall include:

(1) The date of the abortion;

(2) The name and address of the abortion facility or hospital where the abortion was performed;

(3) The nature of the abortion complication diagnosed or treated.

3. All abortion reports shall be signed by the attending physician, and submitted to the state division of health within forty-five days from the date of the abortion. All complication reports shall be signed by the physician providing the post-abortion care and submitted to the division of health within forty-five days from the date of the post-abortion care.

4. A copy of the abortion report shall be made a part of the medical record of the patient of the facility or hospital in which the abortion was performed.

5. The state division of health shall be responsible for collecting all abortion reports and complication reports and collating and evaluating all data gathered therefrom and shall annually publish a statistical report based on such data from abortions performed in the previous calendar year.

188.055. 1. Every abortion facility, hospital, and physician shall be supplied with forms by the division of health for use in regards to the consents and reports required by sections 188.010 to 188.085. A purpose and function of such consents and reports shall be the preservation of maternal health and life by adding to the sum of medical knowledge through the compilation of relevant maternal health and life data and to monitor all abortions performed to assure that they are done only under and in accordance with the provisions of the law.

2. All information obtained by physician, hospital, or abortion facility from a patient for the purpose of preparing reports to the division of health under sections 188.010 to 188.085 or reports received by the division of health shall be confidential and shall be used only for statistical purposes. Such records, however, may be inspected and health data acquired by local, state, or national public health officers.

188.060. All medical records, reports, and other documents required to be kept under sections 188.010 to 188.085 shall be maintained in the permanent files of the abortion facility or hospital in which the abortion was performed for a period of seven years.

188.063. No abortion facility shall advertise or hold itself out as also providing counseling to pregnant women unless:

(1) The counseling is done by a licensed physician, registered nurse or other person holding at least a bachelor's degree from an accredited college or university in psychology or appropriate field or having completed special training in counseling;

(2) The counseling includes factual information given in such a manner as to not be misleading, including explicit discussion of the development of the unborn child; and

(3) The counseling includes a thorough discussion of alternatives to abortion and availability of agencies and services to assist her if she chooses to carry her child to term.

2. The prescribed course of study which shall constitute special training in counseling shall be promulgated by the division of health. Any rule or portion of a rule promulgated pursuant to this chapter may be suspended

by the joint committee on administrative rules if after hearing thereon the committee finds that such rule or portion of the rule is beyond or contrary to the statutory authority of the agency which promulgated the rule, or is inconsistent with the legislative intent of the authorizing statute. The general assembly may reinstate such rule by concurrent resolution signed by the governor.

188.075. Any person who contrary to the provisions of sections 188.010 to 188.085 knowingly performs or aids in the performance of any abortion or knowingly fails to perform any action required by sections 188.010 to 188.085 shall be guilty of a class A misdemeanor and, upon conviction, shall be punished as provided by law.

Section A. Because of the necessity for immediate state action to regulate abortions to protect the lives and health of citizens of this state, this act is deemed necessary for the immediate preservation of the public health, welfare, peace and safety, and is hereby declared to be an emergency act within the meaning of the constitution, and this act shall be in full force and effect upon its passage and approval.

APPENDIX B

PLANNED PARENTHOOD ASSOCIATION OF KANSAS CITY, MISSOURI, INC., Naim S. Kassar, M.D., Reproductive Health Services, Allen S. Palmer, D.O., Appellees,

v.

John ASHCROFT, Attorney General of State of Missouri, Ralph L. Martin, Prosecuting Attorney of Jackson County, Missouri, Appellants.

PLANNED PARENTHOOD ASSOCIATION OF KANSAS CITY, MISSOURI, INC., Naim S. Kassar, M.D., Reproductive Health Services, Allen S. Palmer, D.O., Appellants,

v.

John ASHCROFT, Attorney General of State of Missouri, Ralph L. Martin, Prosecuting Attorney of Jackson County, Missouri, Appellees.

Nos. 80-1130, 80-1530.

United States Court of Appeals,

Eighth Circuit.

Submitted Nov. 17, 1980.

Decided July 8, 1981.

Before LAY, Chief Judge, HENLEY, Circuit Judge, and HARRIS,* Senior Judge.

LAY, Chief Judge.

This is an appeal and cross-appeal relating to the constitutionality of the Missouri statutes regulating abor-

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* Oren Harris, Senior District Judge, Eastern and Western Districts of Arkansas, sitting by designation.

tion.[1] The trial court denied injunctive relief, but issued a declaratory judgment holding all or part of five sections of the Missouri statutes unconstitutional.

Allen S. Palmer, D.O., and Naim S. Kansar, M.D., licensed physicians, and Planned Parenthood and Reproductive Health Services, corporations that operate abortion clinics in Kansas City and St. Louis,[2] brought suit against John Ashcroft, Attorney General of Missouri, and Ralph Martin, prosecuting attorney of Jackson County, Missouri (in his capacity as Jackson County prosecutor and as representative of the class of Missouri prosecutors).[3]

On appeal the Missouri defendants challenge the district court holding on the unconstitutionality of a provision requiring second trimester abortions to be performed in a hospital, parental or judicial consent requirements for minors, restrictions on abortion of viable fetuses, and "informed consent" requirements. They also challenge the award of attorneys' fees. Planned Parenthood cross-appeals from the district court's refusal to declare unconstitutional provisions requiring: (1) that the "informed consent" information must be given by the attending physician; (2) submission of tissue samples from all abortions to a pathologist; and (3) completion of individual reports on women seeking post-abortion care.[4]

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[1] The district courts opinion is published at 483 F.Supp. 679.

[2] In order to simplify discussion plaintiffs are hereinafter referred to collectively as "Planned Parenthood".

[3] In order to simplify discussion defendants are hereinafter referred to as "Missouri".

[4] On June 30, 1979, the district court issued a temporary restraining order to prevent enforcement of the challenged statutes. This order was modified on September 27, 1979. At the conclusion of the trial, the defendants gave assurances that portions of the Act declared unconstitutional would not be enforced. 483 F.Supp. at 701.

The district court also dealt with other provisions of the Missouri statutes, but its conclusions on those questions are not challenged on appeal.

We affirm in part, reverse in part and remand for further proceedings.

In summary, we first find that the district court erred in concluding on the present record that the State's requirement that all second trimester abortions be performed in a hospital is unconstitutional. We find that the fact that hospitals allegedly require parental consent for the admission of minors is not an unconstitutional burden imposed by the State. We nonetheless remand this issue to the district court for further findings as to whether the hospitalization requirement is a substantial burden on women patients seeking abortions in the second trimester (at least up to 18 weeks) and if so whether the State has shown a compelling state interest which justifies the requirement.

We reverse the district court's finding that section 188.030 of the Missouri statutes imposed strict criminal liability on doctors who may abort viable fetuses. We find the Missouri law requires scienter (knowledge) by the physician such that it comports with constitutional requirements. We also reverse the district court's holding that subsection 188.030.2 is unconstitutionally vague.

We likewise find the district court erred in holding the provisions relating to parental or judicial consent for a minor's abortion unconstitutional. We think proper interpretation of the judicial consent provision requires a court to grant judicial consent to a mature minor or a minor for whom an abortion is in her best interests. We find, however, that the provision requiring notice to the parents of all minors is unconstitutional because it requires notice to the parents of minors who are mature or minors for whom it is not in their best interest to give notice. We find the remaining portion of section 188.028 constitutional.

We affirm the district court's finding that the requirement of a second doctor during a second trimester abortion is unconstitutional. We likewise affirm its finding that the 48 hour waiting period is unconstitutional. We also agree with the district court that the informed consent provision requiring notice to parents and the provisions for informed consent under subsections 188.039.2 (1), (2), (3), and (4) are unconstitutional. We uphold the district court's findings that the State may require the attending physician to inform the woman as to the particular medical risks associated with the abortion technique to be used and the available alternatives.

Finally, we agree with the district court there is nothing impermissible in the abortion complication reports required by the State. We find section 188.047, requiring pathology reports following all abortions to be an impermissible requirement. We vacate and remand to the district court for reconsideration the constitutionality of the abortion complication reports required under section 188.052.2.

We affirm the district court's award of attorney fees.

I. *Second Trimester Hospitalization Requirement.*

Section 188.025[5] requires that second and third trimester abortions be performed in a hospital. The district court held that this requirement did not reasonably relate to protection of maternal health, because the dilatation and evacuation method (D&E) could be performed safely outside of a hospital up until the 18th week. The court observed that the effect of the hospitalization requirement was to make a second trimester D&E unavailable in Mis-

[5] Section 188.025 states:

Every abortion performed subsequent to the first twelve weeks of pregnancy shall be performed in a hospital.

Mo.Ann.Stat. § 188.025 (Vernon).

souri because only one hospital in the state allows D&E in the second trimester. Alternatively, the court held that this requirement granted parents the power to veto minor women's decision to have an abortion contrary to *Planned Parenthood* v. *Danforth*, 428 U.S. 52, 96 S.Ct. 2831, 49 L.Ed.2d 788 (1976), because no hospital in Missouri would admit a woman under 18 without parental consent. 483 F.Supp. at 685—87.[6]

A. *Parental Consent for Hospitalization.*

We first address the finding made by the district court that since all hospitals in Missouri require parental consent for abortion to minors the effect of a statute requiring hospitalization is to grant parents the absolute veto forbidden by *Planned Parenthood* v. *Danforth*, 428 U.S. 52, 96 S.Ct. 2831, 49 L.Ed.2d 788 (1976). We must respectfully disagree.

The district court's holding goes a step beyond *Danforth*. In *Danforth*, the *state* required parental consent as a prerequisite for a minor to have an abortion, thus directly interfering with the woman's decision. The present Missouri hospitalization requirement says nothing about parental consent and the State itself has not given

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[6] Several district courts have recently considered similar challenges to second trimester hospitalization requirements. *See Wolfe* v. *Stumbo*, No. C 80–0285 L(A) (W.D.Ky. Dec. 3, 1980) (unconstittuional); *Gary-Northwest Indiana Women's Services* v. *Bowen*, 496 F.Supp. 894 (N.E.Ind. 1980), *aff'd sub nom. Gary-Northwest Indiana Women's Services* v. *Orr*, ——— U.S. ———, 101 S.Ct. 2012, 68 L.Ed.2d 321 (1981) (constitutional); *Margaret S.* v. *Edwards*, 488 F.Supp. 181 (E.D.La. 1980) (unconstitutional). *See also Wynn* v. *Scott*, 449 F.Supp. 1302, 1318 (N.D.Ill. 1978), *aff'd sub nom, Wynn* v. *Carey*, 599 F.2d 193 (7th Cir. 1979) (hospitalization requirement constitutional; no discussion of D&E method; *Hodgson* v. *Lawson*, 542 F.2d 1350, 1354 (8th Cir. 1976) ("The requirement . . . that an abortion be performed in a hospital, which is not challenged here, is an example of permissible state regulation subsequent to the first trimester.").

parents a veto power.[7] Instead, the State has imposed second trimester regulations that it claims are within the State's regulatory power in the second trimester because they are reasonably related to the woman's health. *Roe* v. *Wade*, 410 U.S. 113, 164, 93 S.Ct. 705, 732, 35 L.Ed.2d 147 (1973). The district court's holding would mean that the State could not impose such regulations if they created a situation in which the acts of private entities could interfere with the woman's decision. The problem with this approach to the *Roe* rule is that it would force reevaluation of every health-based second trimester regulation to determine its practical effect, without concern for its health-based justification. For example, Missouri requires that all abortions be performed by a physician. Private physicians may choose not to perform abortions. If statistics showed that no physicians in the state or in some geographic area of the state were willing to perform second trimester abortions on minors without parental consent, the district court's logic would declare the physician requirement unconstitutional.

[1, 2] The point is that when dealing with second trimester regulations, *Roe* declares that the *sole* question is whether the regulation reasonably relates to the woman's health.[8] If the regulation bears a reasonable relation to health, the regulation may and probably will restrict the

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[7] Missouri also argues that the testimony at trial failed to show that *no* hospitals in the state will admit minors for abortion without parental consent. There was no testimony from any person claiming knowledge of the policies of hospitals throughout the state that no hospital would admit a minor without parental consent. Missouri likewise urges that the record demonstrates that many abortions are performed by physicians on an outpatient basis without direct admission to the hospital.

[8] As *Danforth* indicates, the practical availability of safe alternatives is a consideration in determining the rationality of a prohibition on particular methods. Where the state has forbidden relatively safe method on the rationale that equally safe or safer methods are

(Continued on next page)

woman's options. It may also put some private parties in a position where they may impose regulations or costs that restrict the options of some women. But if the statute is reasonably related to health, the fact that private entities (i. e., the hospitals) impose additional requirements without the State's sanction or insistence cannot affect the statute's constitutionality.[9] We reject the district court's alternative ground for finding section 188.025 unconstitutional.

Footnote continued
available, the court must consider the actual availability of these alternatives. Practical obstacles, such as a consent requirement, may enter into this evaluation. However, the inquiry remains whether the regulation is one reasonably related to the women's health.

[9] "Our cases state 'that a State is responsible for the . . . act of a private party when the State, by its law, has compelled the act.' *Adickes* [v. *S.H. Kress & Co.*,] 398 U.S. [144,] 170, [90 S.Ct. 1598, 1615, 26 L.Ed.2d 142] [(1970)]. This Court, however, has never held that a State's mere acquiescence in a private action converts that action into that of the State." *Flagg Bros., Inc.* v. *Brooks*, 436 U.S. 149, 164, 98 S.Ct. 1729, 1737, 56 L.Ed.2d 185 (1978).

If it is true that no hospitals in Missouri will admit minor women without parental consent, and we agree the evidence is not convincing in this respect, the plaintiffs may wish to direct their attention to the actions of the hospitals. We express no view on the merits of this argument, but insofar as particular hospitals have characteristics which render their actions "state action", parental consent requirements arguably violate *Danforths* prohibition against an absolute parental veto. *Cf. Nyberg* v. *City of Virginia*, 495 F.2d 1342 (8th Cir.), *appeal dismissed*, 419 U.S. 891, 95 S.Ct. 169, 42 L.Ed.2d 136 (1974) (unconstitutional for public hospital to refuse facilities to perform elective abortions); *Hodgson* v. *Lawson*, 542 F.2d 1350 (8th Cir. 1976); *Wolfe* v. *Schroering*, 541 F.2d 523, 527 (6th Cir. 1976); *Doe* v. *Charleston Area Medical Center, Inc.*, 529 F.2d 638 (4th Cir. 1975); *Doe* v. *Hale Hospital*, 500 F.2d 144 (1st Cir. 1974); *cert. denied*, 420 U.S. 907, 95 S.Ct. 825, 42 L.Ed.2d 837 (1975). *Poelker* v. *Doe*, 432 U.S. 519, 97 S.Ct. 2391, 53 L.Ed.2d 528 (1977), held that a city operating a municipal hospital need not provide publicly financed hospital services for abortions for indigent women. It does not hold that a state hospital may refuse to allow physicians to perform paid abortions in the hospital, which was the issue in *Nyberg*.

B. Effect on Availability of Second Trimester Abortions.

The district court held that the hospitalization requirement unconstitutionally restricted the availability of second trimester abortions. We conclude that it is not clear that the district court applied the proper legal standard or that the factual findings underlying this holding are adequate. A remand for further proceedings is necessary to provide us with an adequate basis for review of the constitutionality of the hospitalization requirement.

[3, 4] In 1973 *Roe* v. *Wade* addressed whether a second trimester hospitalization requirement is a permissible regulation:

> Examples of permissible state regulation in this area are requirements as to the qualifications of the person who is to perform the abortion; as to the licensure of that person; as to the facility in which the procedure is to be performed, that is, *whether it must be a hospital or may be a clinic or some other place of less-than-hospital status;* as to the licensing of the facility; and the like.

410 U.S. at 163, 93 S.Ct. at 732 (emphasis added).

See also Gary-Northwest Indiana Woman's Services v. *Bowen*, 496 F.Supp. 894 (N.D. Ind. 1980), *aff'd sub nom. Gary-Northwest Indiana Women's Services* v. *Orr*, ___ U.S. ___, 101 S.Ct. 2012, 68 L.Ed.2d 321 (1981).

Missouri argues *Roe* is dispositive here. On the basis of the record and contentions of the parties we deem the issue not so easily resolved. In 1973, when *Roe* was written D&E was not a well-known and common means of performing second trimester abortions. The record demonstrates that today D&E is the most often utilized and safest procedure for second trimester abortion up to 15 weeks.

483 F.Supp. at 685 n.9, & 686 n.13. Yet the district court found that D&E is not generally available to women seeking abortions in Missouri hospitals.[10] It was on this basis the district court found the hospitalization requirement invalid. We perceive the settled standard in reviewing state regulation of abortion rights of the mother to be (1) whether the state requirement imposes a substantial interference and burden on the woman's decision to have an abortion and if so (2) whether the state has shown a compelling basis for the law, that is, that the burden is not undue or unjustifiable. *See Charles* v. *Carey*, 627 F.2d 772 (7th Cir. 1980). In applying the strict scrutiny test, it, of course, must be acknowledged that the state has a compelling interest in the health of the mother and may regulate abortion "in ways that are reasonably related to maternal health." 410 U.S. at 164, 93 S.Ct. at 732.

We view the findings of the district court on this basis.

The conclusion of the district court that second trimester D&E is available in only one hospital in Missouri rests on a thin reed. The conclusion is based solely on the personal knowledge of two physicians, neither one of whom testified that he was familiar with the policies of the hospitals throughout the state[11]. Second, although the record suggests that hospitalized D&Es, when available, are more expensive than nonhospitalized D&Es and that the overall effect of the hospitalization requirement has been to substantially reduce the number of second trimester abortions

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[10] The record does not make clear why D&E is not readily available for hospitalized second trimester abortions.

[11] Dr. Palmer was asked "Are you familiar with any hospital within the St. Louis metropolitan area that performs D&E second trimester procedures?" A. "No." (T. 135). Dr. Kassar was asked "Do you know of any other hospital in the State of Missouri which allows the use of dilation and evacuation in the second trimester?" A. "Not to my knowledge." (T. 257).

in Missouri, the district court made no findings. We think it essential the district court evaluate this overall testimony and make findings in this regard. We think it likewise essential that the record should be factually supplemented as to the availability or nonavailability of D&E procedures in hospitals throughout the state.

[5] From these factual conclusions the district court must then determine whether or not the hospitalization requirement imposes a substantial interference and burden on the woman's decision to have an abortion. Perhaps one can assume that it is implicit in the district court's opinion that mandated second trimester hospitalization limits the accessibility of abortion in Missouri, but based on the court's analysis it is not clear whether the correct legal standard was applied. We think it fundamental that the district court explicitly address the threshold question: Whether the hospital regulation directly interferes with the woman's decision to terminate her pregnancy. Assuming the district court, based on the evidence, answers this question in the affirmative, then the regulation comes under the strict scrutiny standard and the State has the burden to justify the regulation by demonstrating a compelling state interest.

In this regard, the district court properly considered the Supreme Court's previous evaluation of second trimester abortion regulations in *Planned Parenthood* v. *Danforth*, 428 U.S. 52, 75-79, 96 S.Ct. 2831, 2843—2846, 49 L.Ed.2d 788 (1976). The Court found that the saline amniocentesis method, prohibited by a Missouri statute, was the most prevalent second trimester method and that supposedly safe alternatives (i. e., prostaglandins) were not readily available. Under these circumstances, the Court concluded that the prohibition against saline was not reasonably related to the woman's health since it prevented

use of a method that was safer for the woman than the available alternatives.

If the district court finds the hospital requirement constitutes a direct interference with the woman's decision to have an abortion the court must then determine whether Missouri's requirement reasonably relates to the protection of the woman's health. The State, in meeting this burden, must show that nonhospitalized D&E can reasonably be considered more dangerous than hospital procedures, including hospitalized D&E. It must also show that the methods that it argues are as safe or safer than nonhospitalized D&E are actually available to Missouri women. *Cf. Planned Parenthood* v. *Danforth,* 428 U.S. at 77 & n.12, 96 S.Ct. at 2845 & n.12 (burden on state to show availability). Missouri cannot "force a woman and her physician to terminate her pregnancy by methods more dangerous to her health than the method outlawed." *id.* at 79, 96, S.Ct. at 2845.

From this discussion it is clear that the central issue is the relative safety of nonhospitalized D&E and hospitalized methods. The record contains conflicting testimony about safety. Experts called by Planned Parenthood claim nonhospitalized D&E is *safer* than all hospitalized procedures, because hospitals create greater risks of infection, cause greater anxiety, and use general anesthesia. They also point to recent standards issued by the American Public Health Association and the American College of Obstetricians and Gynecologists, retracting their previous recommendation for hospitalization for second trimester abortions. On the other hand, the State's witnesses claim that hospitalization is essential because of the increased risks in the second trimester. The district court made no finding as to the relative safety of nonhospitalized and

hospitalized methods.[12] On remand, if the district court determines that the hospital requirement imposes a substantial interference and burden on the woman's decision to have an abortion then the court should make explicit findings as to the safety of nonhospitalized D&E compared to hospitalized methods.

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[12] The district court stated:

On the record before it, this Court is convinced that aside from the question whether it is performed in a hospital or in an out-patient clinic,[12] dilatation and evacuation is the safest of the presently available post-twelve week abortion techniques.[13]

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[12] Dr. Bernard Nathanson, one of defendants' experts, testified that the mortality (sic) and morbidity rates for D&E procedures performed outside a hospital were probably no different than those performed in hospital.

[13] Mortality rates (per 100,000 cases) for post-12 week abortion techniques for the years 1972–1977 are as follows:

D & E	8.3
Prostaglandins and other agents	10.8
Saline instillation	15.5
Hysterotomy and hysterectomy	45.3

Center for Disease Control, U. S. Dep't. of H. E. W., *Abortion Surveillance 1977*, Table 23.
483 F.Supp. at 686.

The quoted sentence from the text of the district court's opinion is ambiguous. It can be read as saying that it is not necessary to decide whether D&E is safer in a hospital or outside a hospital and that it suffices to say that if you average the mortality from D&E in hospitals and outside hospitals, D&E is safer than other methods. It can also be read as saying that D&E is equally safe in a hospital or outside a hospital, and that the D&E safety rate exceeds all other methods. The first reading would be an inadequate finding, since to invalidate a hospitalization requirement we must know the safety effects of hospitalization. General conclusions which average the two safety rates do not answer that question.

The footnotes do not resolve the ambiguity. The court refers to Dr. Nathanson's testimony that D&E is probably equally safe in a hospital or outside a hospital, but there is no finding to that effect. In footnote 13, the court refers to a study concluding that the mortality rate for

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In sum, we find that the district court failed to properly analyze the hospitalization requirement. On remand, it should first determine if the regulation creates substantial interference with and imposes a direct burden on the woman's decision to have an abortion. If it does, the district court should evaluate whether the hospitalization requirement is justified by a compelling state interest; i. e., whether it is reasonably related to the woman's health. Missouri bears the burden of justifying the restriction. We therefore vacate the district court's finding that Missouri's hospitalization requirement is unconstitutional. We remand this question back to the district court to take additional evidence, if deemed necessary by the parties or by the court, and to make additional findings in accord with this opinion. We respectfully request the district court to certify the record and its findings back to this court within 90 days.

II. *Parental or Court Consent For Minors.*

Section 188.028 prohibits abortions for women under 18 unless parental or court consent is obtained. The district court declared this section unconstitutional. In *Planned Parenthood* v. *Danforth*, 428 U.S. 52, 96 S.Ct. 2831, 49 L.Ed.2d 788 (1976), the Court declared that a state requirement that all minors obtain parental consent prior to

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Footnote continued

D&E is lower than the mortality rate for other methods. These statistics do not distinguish between hospitalized D&E and nonhospitalized D&E, so there is no way to determine from them whether a nonhospitalized D&E is significantly safer than the other available methods.

Planned Parenthood argues that the record supports a finding that nonhospitalized D&E is as safe or safer than hospitalized D&E. It is true that several physicians testified to that effect. However there were also expert witnesses who disagreed. Since there are apparently no statistics that distinguish between hospitalized and nonhospitalized procedures, the conclusion depends upon an evaluation of the relative weight to be given the testimony of the experts. We decline to make a finding from the cold record where it depends on the credibility of the experts, a question uniquely within the province of the district court.

obtaining an abortion was unconstitutional. In *Bellotti* v. *Baird* (Bellotti II), 433 U.S. 622, 99 S.Ct. 3035, 61 L.Ed.2d 797 (1979), four justices concluded that the Massachusetts statute requiring judicial approval in lieu of parental consent was unconstitutional in part because it allowed a court to deny permission based on its perception of the woman's "best interests", even when a minor was mature enough to make her own decision. These four justices (Powell, Burger, Rehnquist and Stewart) described a procedure that would satisfy constitutional requirements:

> A pregnant minor is entitled in such a proceeding to show either: (1) that she is mature enough and well enough informed to make her abortion decision, in consultation with her physician, independently of her parents' wishes; or (2) that even if she is not able to make this decision independently, the desired abortion would be in her best interests. The proceeding in which this showing is made must assure that a resolution of the issue, and any appeals that may follow, will be completed with anonymity and sufficient expedition to provide an effective opportunity for an abortion to be obtained. In sum, the procedure must ensure that the provision requiring parental consent does not in fact amount to the "absolute, and possibly arbitrary, veto" that was found impermissible in *Danforth. Ibid.*

443 U.S. at 643—44, 99 S.Ct. at 3048—49 (footnote omitted).

The Missouri procedure found in subsection 188.028.2 (4) provides:

> (4) In the decree, the court shall for good cause:
>
> (a) Grant the petition for majority rights for the purpose of consenting to the abortion; or
>
> (b) Find the abortion to be in the best interests

of the minor and give judicial consent to the abortion, setting forth the grounds for so finding; or

(c) Deny the petition, setting forth the grounds on which the petition is denied.

The district court concluded that the statute was invalid because in (c) it allows the state court unbridled discretion to "deny the petition, setting forth the grounds on which the petition is denied," limited only by the requirement that the court has "good cause." 483 F.Supp. at 687—90.

[6] We would agree if the statute provides discretion to deny permission to a minor for *any* good cause it would violate the principles set forth in *Danforth* and *Bellotti II*. We believe, however, that in the context of the statutory language, a denial of the petition would initially require the court to find that the minor was not emancipated and was not mature enough to make her own decision and that an abortion was not in her best interests. These findings and the ultimate denial of the petition must be supported by a showing of "good cause". When the statute is so interpreted and applied it obviates Planned Parenthood's objections. Under these circumstances we find the judicial consent provision of the Missouri statute constitutional.

In view of the district court's finding that the judicial approval procedure was invalid the district court did not address Planned Parenthood's other objections to section 188.028. In the interest of judicial economy we do so now. First, Planned Parenthood points out that subsection 188.028.2(2) requires notice to all parents. It is argued that this is unconstitutional, relying on a statement in Justice Powell's opinion in *Bellotti II:*

[E]very minor must have the opportunity—if she so desires—to go directly to court without first consulting or notifying her parents. If she satisfies the court

> that she is mature and well enough informed to make intelligently the abortion decision on her own, the court must authorize her to act without parental consultation or consent.

443 U.S. at 647, 99 S.Ct. at 3050.

The Supreme Court recently addressed this issue further in *H. L.* v. *Matheson*, ____ U.S. ____, 101 S.Ct. 1164, 67 L.Ed.2d 388 (1-981). The Utah statute challenged in *Matheson* required the physician to "notify, if possible, the parents or guardian of the woman upon whom the abortion is to be performed, if she is a minor or the husband of the woman, if she is married." Utah Code Ann. § 76—7—304(2). *Matheson* holds that the state may require that notice be given to the parents of a minor who is living with and dependent upon her parents, is not emancipated by marriage or otherwise, and has made no claim or showing as to her maturity or her relations with her parents. *See* 101 S.Ct. at 1170. The Court narrowed its decision to these facts because the plaintiff "did not allege or proffer any evidence that either she or any member of her class is mature and emancipated." *Id.* at 1169.

Matheson establishes that the parental notice requirement in section 188.028 would be constitutional for minors like the plaintiff in that case. Our inquiry does not stop there, however. The standing of plaintiffs in this case is quite different from that of H. L. Here, plaintiffs are corporations and physicians who seek to provide abortion services. The complaint says that Planned Parenthood and Reproductive Health serve a patient population comprised of 36.5% and 16% of persons under 18, respectively. Plaintiffs have established that some of their patients include minors who are mature enough to make an abortion decision ("mature minors") or minors for whom an abortion without parental consultation is in their best interest

("best interests)) minors). Although the complaint makes no specific claim in this respect, testimony of several plaintiffs indicates a desire to perform abortions for such individuals.[13] In general, these physicians agreed that notice requirements are a burden on availability of services, interfere with the doctor-patient relationship, and do not serve the best interests of the patients. In sum, the record makes it clear that these physicians deal with minors who they consider mature enough to make a decision without parental involvement, or for whom parental involvement is not in their best interests.

[7] We are thus faced with the question left open in *Matheson:* whether it is constitutionally permissible to require mature or "best interests" minors to notify their parents prior to a court hearing in which they seek judicial consent for an abortion. We have no need to analyze this problem at length, as the justices of the Supreme Court have already explored it. As noted, in *Bellotti* II, Justice Powell's opinion advances persuasive reasons for concluding that parental notice is unduly burdensome in cases involving mature or "best interests" minors. 443 U.S. at 642-48, 99 S.Ct. at 3047-51. In *H. L.* v. *Matheson,* Justices Powell and Stewart concurred in the decision, but insisted that "a State may not validly require notice to parents

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[13] *See* Widdicombe (Reproductive Health's Director) (T. 30-36, 74-78) (Reproductive Health identifies mature minors through screening process; some minors show greater maturity than persons of higher age); Palmer (T. 133-37) (some minor patients in his practice capable of giving informed consent without parental consent); Kassar (T. 216-19) (ability to give informed consent depends on factors other than age); Crist (T. 350-52) (presently provides abortions to women under 18 without parental involvement; believes many such women are capable of consent; cites example of "best interests" exception based on statistics showing 50% of those 12 years old and under who seek abortions are incest victims); Vera (T. 444-47) (psychiatrist who counsels women with unwanted pregnancies; personal experience includes instances where parental involvement has adverse effects).

in all cases, without providing an independent decision-maker to whom a pregnant minor can have recourse if she believes that she is mature enough to make the abortion decision independently or that notification otherwise would not be in her best interests." 101 S.Ct. at 1176—77. Justices Marshall, Brennan and Blackmun concluded that the Utah statute, which is very similar to the Missouri statute, is unconstitutional on its fact because the burdens it imposes exceed any identifiable state interests. *Id.* at 1184-94. The analysis in these opinions strongly suggests that subsection 188.028.2(2) is unconstitutional because it requires mature or "best interests" minors to give notice to their parents prior to the court hearing.[14] We so hold. *See also Wynn* v. *Carey,* 582 F.2d 1375, 1388 (7th Cir. 1978).

[8] Planned Parenthood also argues that several other features of section 188.028 are unconstitutional. They claim that the statute's supposed purpose of facilitating parental consultation is undermined by its overinclusiveness and underinclusiveness. They argue it is overinclusive because it requires the involvement of the parents of unemancipated minors who have been widowed or divorced and they argue that the statute is underinclusive because it does not require involvement of the parents of emancipated minors "regardless of their age, maturity, intelligence, education or experience. . . ." While we acknowledge that the classification may not be perfect, we conclude emancipation is a sufficiently accurate indicia of dependence on parental advice to serve as the basis for a legislative judgment by the Missouri legislature.

Nonetheless, Planned Parenthood claims that "emancipated" is excessively vague. They refer to confusion among various witnesses about the meaning of the term.

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[14] Subsection 188.028.2(2) is severable from the remainder of the statute, so our holding does not affect the remainder of section 188.028.

As will be more fully developed later in this opinion, we conclude that to conduct a criminal prosecution under this statute there must be proof of scienter as to the elements of the crime. A successful prosecution would require proof that the physician performing the abortion knew that a minor who received an abortion under subsection 188.028.1 (2) was not "emancipated." Although the presence of a scienter requirement will not entirely eliminate problems caused by vagueness, we are satisfied it is sufficient here.[15] *See Colautti* v. *Franklin*, 439 U.S. 379, 395, 99 S.Ct. 675, 685-86, 58 L.Ed.2d 596 (1979).

[9] Planned Parenthood also claims that the statute does not assure that the procedure will be anonymous and expeditious.[16] We are satisfied that anonymity is sufficiently protected by these procedures, which do not require the minor to disclose her name. Furthermore, the statute sets forth reasonable time requirements for court action on the petition. Although the statute does no more than direct the Missouri Supreme Court to promulgate rules for expedited appellate review, we are confident the Missouri Supreme Court will exercise its jurisdiction in a manner that recognizes the serious damages caused by delay.

We find the judicial consent provision under section 188.028 to be constitutional. We agree with Planned Parenthood, however, that the notice provisions found in subsection 188.028.2(2) are impermissible and must be set aside.

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[15] We note that the Missouri Supreme Court has considered the proof necessary to show emancipation in the context of parental tort liability. *See Wurth* v. *Wurth*, 322 S.W.2d 745, 746 (1959).

[16] The delay argument is based in part on the 48 hours of additional delay required by section 188.039. Since we conclude that it is unconstitutional to require a 48-hour delay, the potential for delay is reduced. See Part IV A, *infra*.

II. *Restrictions on Abortion after Viability.*

[10] The district court held that subsection 188.030.1 is unconstitutional because it allegedly imposes criminal liability for an erroneous but good faith determination that a fetus is nonviable. The district court also found subsections 188.030.2 and 188.030.3 unconstitutional on similar grounds. Further, subsection 188.030.2 was held unconstitutionally vague, and subsection 188.030.3's requirement of a second physician was held to be overbroad because it requires a second physician even when there is no reasonable chance of fetal survival.[17]

A. *Subsection 188.030.1: Mental Culpability Requirement*[18]

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[17] Missouri argues that none of the plaintiffs had standing to challenge section 188.030. The state relies on interrogatories submitted by the plaintiffs in which they said their abortion practices were limited to nonviable fetuses. However, at trial Dr. Kassar testified that he had once conducted an abortion at approximately 28 weeks, which is within the period of viability identified in *Roe* v. *Wade*. The district court found that this testimony established that "[e]nforcement of section 188.030 would have an immediate and direct effect on the medical practice of Dr. Kassar." In *Doe* v. *Bolton*, 410 U.S. 179, 93 S.Ct. 739, 35 L.Ed.2d 201 (1973), and *Planned Parenthood* v. *Danforth*, 428 U.S. 52, 62, 96 S.Ct. 2831, 2837, 49 L.Ed.2d 788 (1976), the Court recognized the standing of plaintiff physicians, since "[t]he physician is the one against whom these criminal statutes directly operate in the event he procures an abortion that does not meet the statutory exceptions and conditions." *Doe* v. *Bolton*, 410 U.S. at 188, 93 S.Ct. at 745. Since Dr. Kassar's credibility was a matter for the district court to resolve, and the district court accepted his testimony, he has standing. It is therefore unnecessary to determine whether other plaintiffs may also have standing.

[18] Subsection 188.030.1 reads:

> No abortion of a viable unborn child shall be performed unless necessary to preserve the life or health of the woman. Before a physician may perform an abortion upon a pregnant woman after such time as her unborn child has become viable, such physician shall first certify in writing that the abortion is necessary to pre-

(Continued on next page)

The district court based its holding that the State unconstitutionally imposed criminal liability without fault on *Colautti* v. *Franklin*, 439 U.S. 379, 99 S.Ct. 675, 58 L.Ed.2d 596 (1979).

In *Colautti* the Supreme Court said the Pennsylvania statute was unduly vague and that the vagueness was "compounded" by the fact the statute subjected a physician to liability without fault. The Court agreed that the Pennsylvania criminal code[19] required scienter as to "whether the physician's actions will result in the death of the fetus." *Id.* at 394, 99 S.Ct. at 685. However, it did not contain a requirement "that the physician be culpable in failing to find sufficient reason to believe that the fetus may be viable." *Id.* at 394-95, 99 S.Ct. at 685-86.

The district court acknowledge that subsection 188.030.1 does not have the vagueness problems encountered with the Pennsylvania law. However, it found that the Missouri law lacks a culpability requirement, and found that this alone rendered the statute unconstitutional. 483 F.Supp. at 692. Without a culpability requirement, the Missouri statute would create a "profound chilling effect on the willingness of physicians to perform abortions near the point of viability in the manner indicated by their best medical judgment." 439 U.S. at 396, 99 S.Ct. at 686.

Footnote continued

serve the life or health of the woman and shall further certify in writing the medical indications for such abortion and the probable health consequences.

Mo.Ann.Stat. § 188.030.1 (Vernon).

[19] The Pennsylvania Act provided that a person who failed to make a viability determination or to exercise the prescribed standard of care was "subject to such civil or criminal liability as would pertain to him had the fetus been a child who was intended to be born and not aborted." Pa.Stat.Ann., Tit. 35, § 6605(a) (Purdon 1977). Criminal sanctions, if any, would be imposed under the separate Pennsylvania law of criminal homicide.

Missouri claims section 188.075 requires culpability as to viability:[20]

> Any person who contrary to the provisions of sections 188.010 to 188.085 *knowingly performs or aids in the performance of any abortion or knowingly fails to perform any action* required by sections 188.010 to 188.085 shall be guilty of a class A misdemeanor and, upon conviction, shall be punished as provided by law.

Mo.Ann.Stat. § 188.075 (Vernon) (emphasis added).

The district court acknowledged that section 188.075 requires a culpable mental state, but decided that like the Pennsylvania law in *Colautti*, it reaches only the act of abortion and not the viability determination.

We respectfully disagree with the district court's interpretation of the Missouri law. To violate section 188.075, one must do more than knowingly perform an abortion—one must knowingly perform an abortion that is contrary to subsection 188.030.1. Since the only abortions contrary to subsection 188.030.1 are abortions on viable unborn children, a physician could not knowingly perform an abortion contrary to subsection 188.030.1 unless he *knew* the child was viable. A good faith determination of nonviability would be a defense.

[11] This interpretation can also be reached by assum-

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[20] In the district court Missouri argued that the court should abstain and permit the state courts to construe this statute. Missouri has not argued for abstention on this appeal. We realize that "it would appear that abstention may be raised by the court *sua sponte*." *Bellotti* v. *Baird*, 428 U.S. 132, 144 n.10, 96 S.Ct. 2857, 2864 n.10, 49 L.Ed.2d 844 (1976). Nonetheless, we see no reason to abstain here, since we find that the language of the Missouri statute clearly withstands the objections raised by Planned Parenthood. Furthermore, we note that Missouri has no certification procedure whereby this court can refer questions of state statutory construction to the state supreme court *Cf. id.* at 150-51, 96 S.Ct. at 2867-68.

ing that by using "knowingly" as it did, the Missouri legislature intended to describe the mental state required for all the crimes governed by section 188.075. However, because of the breadth of the activity covered by this penalty statute, the legislature was not precise as to the application of the mental state requirement to particular elements. Missouri has enacted, a statute to copy with this exact situation:

> If the definition of an offense prescribes a culpable mental state but does not specify the conduct, attendant circumstances or result to which it applies, the prescribed culpable mental state applies to each such material element.

Mo.Ann.Stat. § 562.021 (Vernon) (effective Jan. 1, 1979).

In this case, section 188.075 prescribes "knowingly" as the mental state, and Missouri statutes further define "knowingly":

> A person *"acts knowingly"*, or with knowledge,
>
> (1) With respect to his conduct or to attendant circumstances when he is aware of the nature of his conduct or that those circumstances exist; or
>
> (2) With respect to a result of his conduct when he is aware that his conduct is practically certain to cause that result.

Mo.Ann.Stat. § 562.016.3 (Vernon).

As applied to the elements of this crime, the State would be required to prove that the physician was (1) aware he was performing an abortion; (2) aware this was a viable unborn child; and (3) aware the abortion was not necessary to preserve the life or health of the woman. When interpreted in this fashion, the statute does not impermissibly impinge on the rights of women and their physicians. It

can be used to punish only those physicians who *know* that a fetus is viable and that the abortion is not necessary to the life and health of the woman. Such regulation is clearly permissible under *Roe*.

B. *Subsection 188.030.2.*

[12] The district court next considered subsection 188.030.2.[21] The court first found this section void for failure to require a culpable mental state. We again disagree with this interpretation; we conclude that the Missouri statutes require the State to prove culpability for the elements of this crime, just as they require proof under subsection 188.030.1. The State would have to prove, beyond a reasonable doubt: (1) that the doctor knew the child was viable; (2) that he knew the method he chose was not the available method most likely to preserve the life and health of the unborn child; and (3) that he knew the method he used was less or equally dangerous to the life and health of the woman than the available method most likely to preserve the life and health of the unborn child.

The district court also struck down this section of the Missouri law for unconstitutional vagueness. The court focused on the portion stating that the physician "may" use another technique when the technique that would be

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[21] Subsection 188.032.2 reads:

> Any physician who performs an abortion upon a woman carrying a viable unborn child shall utilize the available method or technique of abortion most likely to preserve the life and health of the unborn child. In cases where the method or technique of abortion which would most likely preserve the life and health of the unborn child would present a greater risk to the life and health of woman than another available method or technique, the physician may utilize such other method or technique. In all cases where the physician performs an abortion upon a viable unborn child, the physician shall certify in writing the available method or techniques considered and the reasons for choosing the method or technique employed.

Mo.Ann.Stat. § 188.030.2 (Vernon).

safest for the fetus presents "a greater risk to the life and health of the woman" than an available alternative.

In *Colautti*, one of the criticisms of the Pennsylvania statute was that the choice of method to be utilized turned on whether an alternative was "necessary". 439 U.S. at 397-401, 99 S.Ct. at 686-689. The Missouri statute does not use this term. Instead, the choice of method turns on a direct balance of risk. If the risk to the woman from the "fetal survival method"[22] is *greater than* the risk to her from alternative methods, the physician *may* choose an alternative. Implicitly, if the risk to the woman from the fetal survival method is *less than or equal to* the risk to her from available alternative methods, the physician *must* use the fetal survival method. Given the precision of this balance, the question is not whether the statute is vague, but whether the woman's constitutional rights are violated by a requirement that a fetal survival method *must* be used whenever the risks to the woman with that method are less than or equal to the risk from other possible methods.[23]

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[22] This term is used here to refer to "the available method most likely to preserve the life and health of the unborn child." Mo.Ann.Stat. § 188.030.2 (Vernon).

[23] The district court emphasized that the statute says the physician "*may*" use another technique, implying that this inserts impermissible vagueness. However, the effect of the word "may" in this provision is this: when the risk to the woman of a fetal survival method is greater than the risk of available alternative methods, the physician *may* choose whatever method he wishes. In other words, when the risk of the survival method is greater, the statute leaves the doctor's choice exactly as it would be without the existence of this statute: to choose the method he deems appropriate. While this means he may choose the method that is more dangerous to the woman and safer for the fetus, the physician could have made a similar decision prior to passage of this statute; hence, the statute does nothing to alter the rights of the woman and her physician. We are aware of no decisions that have required the state to pass legislation *requiring* physicians to choose a method most favorable to the woman's life and health.

[13, 14] The State has regulated post-viability abortions by requiring use of particular methods. This is clearly within the State's power, as long as it does not interfere with medical judgments as to the method necessary for the preservation of the life or health of the mother. *Roe* v. *Wade*, 410 U.S. at 164-65, 93 S.Ct. at 732-33. Thus, the Missouri statute is clearly constitutional in requiring use of a fetal survival method when the risks of that method to the woman are lower than alternatives. The only remaining question is whether the state can constitutionally require the use of the fetal survival method in cases where the risk is equal. By definition, if the risk is absolutely equal, the life and health of the mother are subjected to no greater risk by requiring use of the fetal survival method.[24] by requiring use of such a method when the risks from it are less than or equal to the risk of alternatives, Missouri is within permissible bounds of regulation.[25]

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[24] In discussing the Pennsylvania statute in *Colautti*, the Court observed that the statute "does not clearly specify, as appellants imply, that the woman's life and health must always prevail over the fetus' life and health when they conflict." 439 U.S. at 400, 99 S.Ct. at 688. This statement is in the context of a discussion of the vagueness of the statute, and merely rebuts a claim by Pennsylvania as to the specificity of the statute. *Colautti* did not hold that language of this nature is constitutionally required. Nor does it hold that a state may not require use of a method more likely to lead to fetal survival if the risks to the woman are equal. Even if this language were binding, by definition the woman's life and health and the fetus' life and health are not in "conflict" when the method favoring one's survival has no detriment to the chances of the other to survive.

[25] *Cf. Margaret S.* v. *Edwards*, 488 F.Supp. 181 (E.D.La. 1980). The court held that a Louisiana statute was unconstitutional. It provided:

> Any physician who shall perform or induce an abortion upon a pregnant woman where the presumption of viability exists shall utilize the available method or technique of abortion most likely to preserve the life and health of the unborn child.

The court observed that this made no allowance for the life and health of the mother, as required by *Roe*. Here, of course, the statute allows the doctor to consider the life and health of the woman in choosing a method.

We have no disagreement with Planned Parenthood's argument that these are medical judgments that should not be second-guessed. However, if, as we have held, there is a culpability requirement, the State faces a stringent burden of proof as to the physician's actual knowledge of the viability of the child and the danger of the alternative methods. The State's power to regulate does not permit it to decide if a particular child is viable, or to choose a particular procedure, or to decide whether a procedure is necessary for the life and health of a particular woman. These decisions are left to physicians. The post-viability regulatory power does permit the State to criminalize abortions performed *after* a physician has made a judgment that a fetus is viable and the abortion or abortion method is not necessary for the life and health of the woman.

C. Second Doctor Requirement.

[15] The district court declared subsection 188.030.3[26] unconstitutional because of the lack of a culpability requirement. Again, we find that the Missouri statutes require culpability as to each material element of the crime.

The district court also had another reason for striking down this section: the second physician requirement

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[26] Subsection 188.030.3 states:

> An abortion of a viable unborn child shall be performed or induced only when there is in attendance a physician other than the physician performing or inducing the abortion who shall take control of and provide immediate medical care for a child born as a result of the abortion. During the performance of the abortion, the physician performing it, and subsequent to the abortion, the physician required by this section to be in attendance, shall take all reasonable steps in keeping with good medical practice, consistent with the procedure used, to preserve the life and health of the viable unborn child; provided that it does not pose an increased risk to the life or health of the woman.

Mo.Ann.Stat. 188.030.3 (Vernon).

is overbroad because it requires a second physician even when the fetus has no reasonable chance of survival. Thus, the requirement is an "undue burden" in at least some cases. *See Charles* v. *Carey*, 627 F.2d 772 (7th Cir. 1980).

Review of this holding requires review of the support for the two underlying factual conclusions: (1) that the second physician requirement is a burden and (2) that there is no possible justification for a second physician during a D&E.

1. **Burden on Decision.**

[16] Missouri does not deny that costs are increased by requiring a second physician, thereby restricting availability of the abortion.[27] Instead, Missouri argues that increased cost is not a direct burden. Missouri basis this argument on *Harris* v. *McRae*, 448 U.S. 297, 100 S.Ct. 2671, 65 L.Ed.2d 784 (1980), and other cases dealing with refusals by states or the federal government to make government funds available for abortions. *See also Williams* v. *Zbarz*, 448 U.S. 358, 100 S.Ct. 2694, 65 L.Ed.2d 831 (1980); *Maher* v. *Roe*, 432 U.S. 464, 97 S.Ct. 2376, 53 L.Ed.2d 484 (1977). However, Missouri's argument is not supported by these cases, which focus on the "basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy." *Maher* v. *Roe*, 432 U.S. at 475, 97 S.Ct. at 2383. The state's refusal to pay for abortions is said not to be a "direct interference" because it "places no governmental obstacle in the path of a

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[27] *E. g.*, Kassar (T. 226) (burden because requires presence of pediatrician for up to 24 hours); Crist (T. 354-57) (costs are increased by second physician requirement; conclusory statement it interferes with doctor-patient relationship); Kretzschmar (T. 394-95) (requiring second physician significantly increases cost; interferes with doctor-patient relationship and burdens availability).

woman . . .", *Harris* v. *McRae*, 100 S.Ct. at 2687, that is, the regulation does not create the woman's lack of finances, but merely fails to remedy it. In contrast, a government-imposed regulation that adds to the cost of abortion is a government-created obstacle and is subject to strict scrutiny. If the rule was as Missouri claims, the state would be free to add on any costly requirements under the guise of regulation, and would not be required to justify these requirements by a compelling state interest.

It is apparent from even the conclusory testimony here that a second physician requirement would raise the cost of an abortion, thereby decreasing its availability and interfering with the decisions of some women to obtain abortions. Missouri did not challenge that proposition, and must justify its law with a compelling state interest.

2. *Justification for Second Physician During D&E.*

We move then to the argument that there is no possible justification for a second physician during a D&E procedure. Missouri claims there is no overbreadth in the second doctor requirement because doctors do not perform D&Es after viability. However, Dr. Crist testified (T. 427-29), with examples from his practice, that D&E may be the best medical practice at 28 weeks; he also testified that in the 60 days prior to his testimony he had done five post-24 week abortions by D&E. He chose this method because "there were absolutely contraindications to the use of hypertonic solutions or the use of prostaglandins, or the induction of labor." (T. 438).

[17, 18] Missouri points to testimony by other physicians that they do not or would not use D&E at these stages. However, this serves only to indicate that the question is one in which medical opinions and circumstances may differ. There is no error in the district court's

factual conclusion that for some patients and physicians, D&E is the method of choice even after viability is possible.[28]

The next question is whether the district court correctly concluded that a fetus cannot survive D&E. If the fetus could survive, the state may be able to require the presence of a second physician in furtherance of its compelling interest in the potential life of the fetus.

The D&E procedure is described in Tietze, Induced Abortion: 1979 (3d ed. 1979).

> When vaginal evacuation is performed in the second trimester, it typically involves use of a small forceps for the dismemberment and removal of the fetus, of a suction cannula for the aspiration of amniotic fluid and of placental and fetal debris, and of a surgical curette to ensure complete evacuation. To minimize the risk of laceration, laminaria is often used to dilate the cervix.

Id. at 68.

Several physicians said that dismemberment of the fetus is not always essential in a D&E procedure. However, Dr. Kassar indicated this was true of a smaller fetus; presumably, a viable fetus is larger. Several physicians testified that there was no chance a viable fetus would survive D&E.[29]

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[28] We note that the choice of D&E after viability is subject to the requirements of subsection 188.030.2. Thus D&E is not to be used when the child is viable and other methods are available that are more likely to preserve its life and health, and those methods do not pose a greater risk to the life and health of the woman than another available method or technique.

[29] *E. g.* Crist (T. 355) ("no chance"); Kretzschmar (T. 393); Nathanson (T. 615) (D&E never results in a live birth); Schmidt (T

(Continued on next page)

Missouri relies solely on Dr. Crist's testimony. Dr. Crist's testimony on cross-examination contradicted in part his earlier testimony, and did not specifically refer to a fetus that had reached viability. It was also contradicted by the overwhelming weight of testimony of doctors testifying for both sides. These experts all agreed that when D&E is performed on a viable fetus there is no chance of survival, apparently because the fetus has reached a size where dismemberment is unavoidable. We conclude the district court's finding of fact as to the chances of survival is not clearly erroneous.

We agree with the district court that the second physician requirement is overbroad, and thus imposes a burden on women in cases where the burden is not justified by any possibility of survival of the fetus. We therefore affirm the district court's holding.[30]

IV. *"Informed Consent."*

Section 188.039 requires that the attending physician give a woman specific information prior to an abortion,

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Footnote continued

836) (no reason for second physician when D&E is used on viable fetus; no possibility of survival); Martin deposition, Defendant's Exhibit Q at 76-77 (live birth after D&E "an impossibility"). *See also* Kassar, (T. 258) (during second trimester, fetus is usually of sufficient size that skull must be crushed for D&E; chance of fetal survival in this type of procedure is "nil").

[30] In *Margaret S. v. Edwards*, 488 F.Supp. 181 (E.D.La. 1980), the court discussed the constitutionality of a second physician requirement and concluded that such requirements were permissible, although the Louisiana statute imposed improper standards on the second physician. The court did not deal specifically with the D&E method, so its discussion was based on an evaluation of the chances of a live birth using any method. The court found that "the State can choose to be prepared for those rare instances when there is a live birth." *Id.* at 201. Nothing in this conclusion is in conflict with the result reached here. We do not reach the question of the state's right to require a second physician when there is some possibility the fetus may survive.

and requires that 48 hours lapse between giving the information and the abortion. It also requires that the woman sign a consent form acknowledging that she has been given the required information.

A. *48 Hour Wait.*

[19] The district court held that the 48 hour waiting requirement was unconstitutional, based on evidence that it increases delay, and delay increases the risk to the woman. Furthermore, it "requires that a woman make a minimum of two visits to her physician or to a clinic. This requirement involves additional time and expense and, for women living outside the metropolitan areas, may require additional travel or subsistence expense during the delay." 483 F.Supp. at 696. We affirm the ruling of this district court. *See Planned Parenthood League* v. *Bellotti*, 641 F.2d 1006, 1014-16 (1st Cir. 1981) (preliminary injunction against 24 hour wait); *Charles* v. *Carey*, 627 F.2d 772, 785-86 (7th Cir. 1980) (24 hours).[31]

B. *Notice to Parents of Minors.*

[20] Subsection 188.039.2 requires a minor to acknowledge that her parents have been given the information prescribed in section 188.039, and it forbids physicians to perform abortions unless the minor has so acknowledged. The district court held this provision unconstitutional on the grounds it was in contravention to the principles in

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[31] These findings are very similar to the district court's findings on this issue in *Women's Services* v. *Thone*, 483 F.Supp. 1022 (D.Neb. 1979). Based on these findings, the district court in Women's Services held the requirement unconstitutional, and this court affirmed. 636 F.2d 206, 210 (8th Cir. 1980). However, the entire decision in *Women's Services* was remanded to this court to reconsider in light of its recent decision in *H. L.* v. *Matheson*, ____ U.S. ____, 101 S.Ct. 1164, 67 L.Ed.2d 388 (1981). *Matheson* recognizes time is likely to be of the essence in an abortion decision. The Utah statute did not provide a mandatory waiting period.

Bellotti II, discussed in Part II, *supra*. On the basis of our discussion of *Bellotti II* and *H. L.* v. *Matheson* in Part II, *supra*, we agree that this requirement is also unconstitutional because it requires parental notice even when the minor is mature or emancipated or the abortion is in her best interests, and a court has made findings to that effect.

C. *"Probable Physiological and Anatomical Characteristics of the Unborn Child" and "Physical Danger . . . and Psychological Trauma".*

Subsection 188.039.2(3) requires the woman to acknowledge that she has been informed of "[t]he probable anatomical and physiological characteristics of the unborn child at the time the abortion is to be performed." Subsection 188.039.2(4) says she must be informed of "[t]he immediate and long-term physicial dangers of abortion and psychological trauma resulting from abortion and any increased incidence of premature births, tubal pregnancies and stillbirths following abortion." The district court held these provisions unconstitutional. 483 F.Supp. at 698-99.

The Supreme Court allows the state to require "informed consent", even in the first trimester. *See Planned Parenthood* v. *Danforth*, 428 U.S. at 64-67, 96 S.Ct. at 2838-2840. Based upon that decision, courts have sustained various provisions designed to insure that the woman has made an informed consent. *See e.g., Wolfe* v. *Schroering*, 541 F.2d 523, 526 (6th Cir. 1976); *Planned Parenthood Association* v. *Fitzpatrick*, 401 F.Supp. 554, 587 (E.D.Pa. 1975), *aff'd*, 428 U.S. 901, 96 S.Ct. 3202, 49 L.Ed.2d 1205 (1976). *Cf. Planned Parenthood League* v. *Bellotti*, 641 F.2d at 1017-18 (state may require use of a special form if physician is not required to read it or have it signed

in office, or discuss it with the woman, and when physician may give any additional information).

Nonetheless, *Danforth* recognized that there are limits to what the state may require. The Court construed "informed consent" to mean:

> [T]he giving of information to the patient as to just what would be done and as to its consequences. To ascribe more meaning than this might well confine the attending physician in an undesired and uncomfortable straitjacket in the practice of his profession.

428 U.S. at 67 n.8, 96 S.Ct. at 2840 n.8.

The Court explained this further in *Whalen* v. *Roe*, 429 U.S. 589, 97 S.Ct. 869, 51 L.Ed.2d 64 (1977):

> The constitutional right vindicated in *Doe* [v. *Bolton*, 410 U.S. 179, [93 S.Ct. 739, 35 L.Ed.2d 201] (1973)] was the right of a pregnant woman to decide whether or not to bear a child without unwarranted state interference. The statutory restrictions on the abortion procedures were invalid because they encumbered the woman's exercise of that constitutionally protected right by placing obstacles in the path of the doctor upon whom she was entitled to rely for advice in connection with her decision. If those obstacles had not impacted upon the woman's freedom to make a constitutionally protected decision, if they had merely made the physician's work more laborious or less independent without any impact on the patient, they would not have violated the Constitution.

Id. 429 U.S. at 605 n.33, 97 S.Ct. at 879 n.33.

Other abortion decisions emphasize the importance of the doctor/patient relationship to the abortion decision. *See, e. g., Roe* v. *Wade*, 410 U.S. 113, 164, 93 S.Ct. 705, 732, 35

L.Ed.2d 147 (1973); *Doe* v. *Bolton*, 410 U.S. 179, 196-97, 93 S.Ct. 739, 749-50, 35 L.Ed.2d 201 (1973); *Colautti* v. *Franklin*, 439 U.S. 379, 387-88, 99 S.Ct. 675, 681-82, 58 L.Ed.2d 596 (1979).

[21] In this context, we conclude that the state may not infringe on the *woman's* right to consult with a physician whose judgment and advice on the abortion decision has not been dictated by the state. Such a practice by the state may prevent the woman and the doctor from freely making the judgments left to them by *Roe* and subsequent decisions.

With this principle in mind, numerous courts have declared statutes unconstitutional which require physicians to give patients information contrary to their best judgment or medical opinions. *See Freiman* v. *Ashcroft*, 584 F.2d 247 (8th Cir. 1978), *aff'd*, 440 U.S. 941, 99 S.Ct. 1416, 59 L.Ed.2d 630 (1979); *Charles* v. *Carey*, 627 F.2d 772, 783-84 (7th Cir. 1980).[32] Most recently the First Circuit granted a preliminary injunction against a Massachusetts statute requiring "a description of the stage of development of the unborn child." The court found that information was immaterial to medically relevant considerations, and caused emotional distress. It also observed that many women did not want the information and their doctors considered it bad medical practice to force it on them. *Planned Parenthood League* v. *Bellotti*, 641 F.2d at 1021-23.

[22] We agree with the analysis in these cases, and the findings of the district court support similar conclusions

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[32] *See also Leigh* v. *Olson*, 497 F.Supp. 1340 (D.N.D. 1980); *Margaret S.* v. *Edwards*, 488 F.Supp. 181, 210-11 (E.D.La. 1980); *Akron Center for Reproductive Health* v. *City of Akron*, 479 F.Supp. 1172, 1203 (N.D.Ohio 1979); *Wynn* v. *Scott*, 449 F.Supp. 1302, 1316-17 (N.D.Ill.), *appeal dismissed*, 439 U.S. 8, 99 S.Ct. 49, 58 L.Ed.2d 7 (1978), *aff'd*, 599 F.2d 193 (7th Cir. 1979).

here. The district court found that the "anatomical characteristics" and "physical dangers" information "interfere[s] with the right of a woman to consult with her physician regarding abortion free from state interference." 438 F.Supp. at 698. On the basis of repeated testimony it found that some physicians do not believe this information is in the best health interests of their patients, and that it may increase the risks from abortion by increasing the patient's anxiety and tension. Furthermore, some physicians testified they do not believe there are any long-term physical or psychological effects of abortion, or are unaware of such effects. Thus, "such physicians, in the exercise of their best medical judgment, would choose not to provide their patients seeking abortions with [the information]." *Id.* these findings demonstrate that there is a burden on the woman's decision: she is deprived of the freedom to make a decision in reliance on information provided by her physician based upon the physician's best medical judgment. Furthermore, the woman's decision is burdened insofar as the anxiety and tension involved in such a decision are increased without medical justification. There is no rational reason, much less a compelling state interest, that justifies forcing physicians to give women information that the physicians consider injurious to the woman's health or simply untrue. *See Planned Parenthood League* v. *Bellotti*, 641 F.2d at 1021-22. We affirm the district court's holding that subsections 188.039.2(3) and 188.039.2(4) are unconstitutional.

D. *Pregnancy and Time Elapsed Since Conception.*

Subsections 188.039.2(1) and 188.039.2(2) require the physician to tell the woman that in the physician's best medical judgment the woman is pregnant and the number of weeks elapsed since the probable time of conception. The district court found these requirements unconstitutional because they would prevent the procedure known as "men-

strual extraction." Dr. Crist described this procedure as follows:

> Menstrual extraction, endometrical aspiration, and menstrual induction are all synonomous terms for aspiration or removal of uterine contents prior to the time that a classic urinary pregnancy test would turn positive, and that would be roughly four weeks after conception or 42 days after the last menstrual period.

T. 364-65.

The district court concluded that the physician cannot determine at this stage whether the woman is in fact pregnant. If a physician desired to perform this procedure with intent to cause an abortion, this statute would present the procedure because it would be impossible for the physician to give the woman the required information.

Missouri does not claim that a prohibition against menstrual extraction is constitutional, but argues here that the statute does not affect menstrual extraction because a menstrual extraction is not an abortion.[33] As the district court noted, Dr. Crist testified that it is a reasonable medical certainty that 85% of women with a menstrual period 10 days late are pregnant. Given this probability, it is entirely possible that a physician would perform the procedure with intent to terminate a pregnancy. During cross-examination, Dr. Palmer testified:

> Q. Have you ever performed a menstrual extraction intending to terminate the life of a fetus in his or her mother's womb?

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[33] Abortion is defined under Missouri law as "the intentional destruction of the life of an embryo or fetus in his or her mother's womb or the intentional termination of the pregnancy of a mother with an intention other than to increase the probability of a live birth or to remove a dead or dying unborn child." Mo.Ann.Stat. § 188.015(1) (Vernon).

A. The intention of a menstrual extraction is either to correct a menstrual problem, which would would be a mini-D&C, or if the patient is pregnant and can't detect it, it is an abortion.

So the answer to your question is yes. T. 193.

[23] The district court found that the present statutory language would prevent physicians from performing menstrual extractions since it is impossible to be certain that the woman is pregnant. We agree. Since there is no justification for such a prohibition, subsections 188.039.2(1) and (2) were properly declared unconstitutional.

E. *Attending Physician Must Give the Information.*

Section 188.039.1 requires that the "attending physician" inform the woman of the information described in subsection 188.039.2. The district court said this requirement is constitutional.

Planned Parenthood argues that the information can be given by non-physicians and that requiring physicians to give the information creates scheduling problems, delays, and high costs. They base this in part on their claim that "attending physician" refers to the same doctor who performs the operation.

[24] The delay and scheduling problems are not significant without the 48-hour waiting period. Similarly, the claims of higher cost and delay due to forcing a physician to spend up to an hour and a half giving this information have been undercut since the court has held several of these information requirements unconstitutional. The portions of subsection 188.039.2 that are not unconstitutional merely require the attending physician to inform the woman of the particular risks associated with the abortic technique to be used, and alternatives to abortion. The district court properly concluded that this minimal requirement is con-

sistent with the principle that the abortion decision is one to be made by a woman and her physician,[34] and advances the state's interest in insuring that the decision is made with "full knowledge of its nature and consequences." *Planned Parenthood* v. *Danforth*, 428 U.S. at 67, 96 S.Ct. at 2840. *See Akron Center for Reproductive Health, Inc.* v. *City of Akron*, 479 F.Supp. 1172, 1204 (N.D.Ohio 1979); *Women's Community Health Center* v. *Cohen*, 477 F.Supp. 542, 550 (D.Me. 1979).

V. *Pathology Reports.*

Section 188.047 requires:

> A representative sample of tissue removed at the time of abortion shall be submitted to board eligible or certified pathologist, who shall file a copy of the tissue report with the state division of health, and who shall provide a copy of the report to the abortion facility or hospital in which the abortion was performed or induced and the pathologist's report shall be made a part of the patient's permanent record.

Mo.Ann.Stat. § 188.047 (Vernon).

In upholding the constitutionality of this provision the court applied a rational basis test and found that

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[34] Planned Parenthood emphasizes the problems raised by requiring that the same doctor give the information and perform the operation. It is by no means clear that the statute requires this. Subsection 188.039.1 says *no physician* shall perform an abortion unless *the attending physician* gave the required information. Subsection 188.039.2, which describes the information, refers exclusively to "the attending physician". Although it is not necessary to our holding, one could interpret this to mean that the *attending* physician must give the information, and that another physician may perform the operation. In contrast, in *Charles* v. *Carey*, the statute stated explicitly that the information must be given "by the physician who is to perform the abortion." 627 F.2d at 780 n.11. The court's declaration that this section was unconstitutional was based on the burdensomeness of this requirement.

the requirement was rationally related to the state's interest in the standards of medical care and was not an undue burden.

Planned Parenthood argues that this regulation burdens the woman's decision to obtain an abortion by increasing costs. The evidence showed this requirement would raise the cost of an abortion by $10 to $40.[35]

As we previously observed, *Harris* v. *McRae*, 448 U.S. 297, 100 S.Ct. 2671, 65 L.Ed.2d 784 (1980), and similar cases do not hold that imposition of additional costs cannot be a burden on the woman's decision. Section 188.047 applies to all abortions, including those performed in the first trimester. This court has previously discussed review of regulations imposed on those providing for trimester abortions:

> [T]he state has the power to insure that the first trimester abortions, like other medical procedures, are performed under conditions providing for the maximum safety of the patient. Statutory provisions which merely authorize the adoption of regulations, albeit during the first trimester, are not unconstitutional. *See Planned Parenthood Association* v. *Fitzpatrick*, 401 F.Supp. 554, 576 (E.D.Pa. 1975). . . .
>
> Any regulations promulgated under such enabling statutes must, of course, comply with the requirements of the Supreme Court. A state can impose the same regulations on a clinic, specifically built to perform abortions during the first trimester, that are imposed on other clinics that perform surgical procedures requiring approximately the same degree of skill and

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[35] Judith Widdicombe, Executive Director of Reproductive Health, said the current cost of a first trimester abortion at Reproductive Health is $170, and estimated that this requirement would increase costs by $19.40/abortion (approximately 11.4%).

> care as the performance of first trimester abortions. As long as the regulations applying to abortion clinics are the same as those applied to other clinics performing similar surgical procedures, it would not be impermissible to make them specifically applicable to abortion clinics. *Where the state regulates abortions beyond its regulation of similar surgical procedures, that difference in treatment must be shown to be necessitated by the particular characteristics of the abortion procedure. See Word* v. *Poelker, supra* at 1351-52.

Hodgson v. *Lawson*, 542 F.2d 1350, 1357-58 (8th Cir. 1976) (emphasis added, footnote omitted).

There was uncontroverted testimony that Missouri does not require submission of tissue to a pathologist following other medical procedures. Thus, the difference in requirements must be justified by the particular characteristics of the abortion procedure. As the Seventh Circuit stated in *Friendship Medical Center* v. *Chicago Board of Health*, 505 F.2d 1141 (7th Cir. 1974), *cert. denied*, 420 U.S. 997, 95 S.Ct. 1438, 43 L.Ed.2d 680 (1975):

> [T]he state will bear a heavy burden . . . both with respect to showing the existence of a unique medical complication and with respect to showing that the problem is of such a nature as to be beyond the general scope of a doctor's professional judgment.[36]

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[36] *See Planned Parenthod of Minnesota, Inc.* v. *Citizens for Community Action*, 588 F.2d 861 (8th Cir. 1977) (imposition of restrictive "zoning" ordinance on first trimester abortion facility); *Word* v. *Poelker*, 495 F.2d 1349 (8th Cir. 1974) (ordinance regulating first trimester abortion clinics). *See also Mahoning Women's Center* v. *Hunter*, 610 F.2d 456 (6th Cir. 1979), vacated and remanded, 447 U.S. 918, 100 S.Ct. 3006, 65 L.Ed.2d 1110 (1980) (ordinance requiring expensive equipment and supervision by experienced obstetrician); *Women's Medical Center of Providence, Inc.* v. *Cannon*, 463 F.Supp. 531 (D.R.I 1978) (requiring licensed physician with hospital privileges); *Florida Women's*

(Continued on next page)

Id. at 1154.

The issue here is not whether pathology reports are useful and even necessary in some cases. They clearly are. Testimony indicated that abnormalities in the tissue may warn of serious, possibly fatal disorders. Instead, the question here is whether Missouri has shown any reason why the physicians and medical facilities performing abortions cannot make medical judgments about the desirability of a pathology report in an individual case, while physicians and medical facilities performing all other types of surgery are free to exercise their professional judgment.

> No proof sufficient to explain this distinction was offered by the State. Missouri relied on testimony indicating that some physicians, including pathologists, believe that it is good medical practice to have a pathologist examine any tissue removed from the body. These physicians also expressed concern that in a close case, a pathologist may see something that the ordinary physician would not. We accept this testimony as true, but these justifications do not distinguish tissue obtained from abortion from that obtained in every other surgical procedure. In procedures other than abortion, some physicians may say that every tissue should be examined and that nonpathologist physicians may err in close cases; further, the consequences to the patient of error may be serious. Nevertheless, in procedures

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Footnote continued

Medical Clinic, Inc. v. *Smith*, 478 F.Supl. 233 (S.D.Fla. 1979), *appeal dismissed*, 620 F.2d 297 (5th Cir. 1980) (various first trimester regulations unconstitutional, including pathologist requirement); *Arnold* v. *Sendak*, 416 F.Supp. 22 (N.D.Ind.), *aff'd*, 429 U.S. 968, 97 S.Ct. 476, 50 L.Ed.2d 579 (1976). *Cf. Baird* v. *Department of Public Health*, 599 F.2d 1098 (1st Cir. 1979) (abortion-neutral regulation of clinic licensing); *Abortion Coalition* v. *Michigan Department of Public Health*, 426 F.Supp. 471 (E.D.Mich. 1977).

other than abortion Missouri leaves it to the professional judgment of the physician to examine the tissue and decide whether a pathologist's examination and the additional costs it imposes are warranted. Physicians who perform abortions testified that they exercise their professional judgment. They routinely perform "gross" examinations of the tissue, and send it to the pathologist if their professional judgment so dictates.[37]

[25] In the absence of a more convincing justification for this distinction between first trimester abortion and other surgical procedures, we hold that the provision is unconstitutional.[38] We emphasize that this does not leave patients unprotected. Missouri law requires that all abortions be performed by physicians. As with any other surgical procedure, patients are protected by "the physician's medical judgment and professional, ethical standards and . . . city and state health regulations which have application to [medical] procedures in general." *Word* v. *Poelker,* 495 F.2d 1849, 1351 (8th Cir. 1974). Patients are also protected by legal remedies for negligence of medical personnel.

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[37] A "gross" examination is one unaided by a microscope. Pathologists may perform a gross examination or a miscroscopic examination if they feel it is necessary. This statute does not specify which type of examination the pathologist is to perform. Dr. J. Chandler Smith, Chairman of the Pathology Department at the University of Missouri Medical School, testified that with respect to abortions, a non-pathologist physician is just as capable of performing an adequate gross examination as is a pathologist, and that the abnormalities which are of concern are readily identifiable.

[38] *Contra, Wynn* v. *Scott,* 449 F.Supp. 1302, 1322 (N.D.Ill.), *appeal dismissed,* 439 U.S. 8, 99 S.Ct. 49, 58 L.Ed.2d 7 (1978), *aff'd,* 599 F.2d 193 (7th Cir. 1979) (no burden on woman; plaintiff did not argue it burdened or discouraged patients).

VI. *Recordkeeping.*

Planned Parenthood challenges the constitutionality of subsection 188.052.2,[39] which deals with post-abortion care.

Planned Parenthod argues that many women will resist supplying the physician with the required information, particularly the time and place of the abortion. If the physician knowingly fails to complete the report, he or she is subject to criminal penalties. So, if a patient seeks the physician's services and refuses to give the required information, the physician can either treat her and risk criminal prosecution or refuse to care for her.

Neither the district court's opinion nor the Missouri defendants addressed this argument. In evaluating it, we observe that to subject this reporting requirement to strict scrutiny would be inappropriate here, as there are no suspect classifications and no fundamental rights at stake. Subsection two does not burden a woman's decision to seek an abortion, since it deals only with post-abortion care.[40] *See Whalen* v. *Roe*, 429 U.S. 589, 605 n.33, 97 S.Ct. 869, 879 n.33, 51 L.Ed.2d 64 (1977). Thus, this reporting requirement must only be rationally related to a constitutionally permissible purpose. Planned Parenthood is correct in arguing that the statute, on its face, does not state

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[39] Subsection 188.052.2 provides:

> An individual complication report for any post-abortion care performed upon a woman shall be completed by the physician providing such post-abortion care. This report shall include:
>
> (1) The date of the abortion;
>
> (2) The name and address of the abortion facility or hospital where the abortion was performed;
>
> (3) The nature of the abortion complication diagnosed or treated.

Mo.Ann.Stat. § 188.052.2 (Vernon).

[40] It seems highly unlikely that a woman would forego a legal abortion for fear that in the event of complications she would have to tell a physician when and where she received the abortion.

a defense for the physician if the patient refuses to provide information. Apparently Missouri feels that obtaining this information is of such importance that it must threaten the physician with criminal prosecution so that he or she will, in turn, threaten the woman with refusal of treatment. In view of the fact that the cause is to be remanded to the district court we defer judgment on this section until the district court has passed on the same. We therefore certify this issue back to the district court within the same time frame as the other issue certified.

VII. *Attorneys' Fees.*

The district court awarded $22,037.73 to plaintiffs' attorneys.[41] Missouri argues (1) Planned Parenthood did not "prevail" on every issue, since only five of eight challenged sections were party invalidated; and (2) the district court included fees for travel time and clerical work. They focus mainly on the work done by the "second chair", Barbara Beran, that included taking notes on the testimony, which Missouri claims was "clerical" and not compensable at $60/hour. They also claim that travel time should not be compensated, or should be at a lower rate, and that travel was unnecessary because the suit would have been in St. Louis but for "forum-shopping" by the plaintiffs' attorney.

[26] The award of attorneys' fees should be based on the guidelines set forth in *Johnson* v. *Georgia Highway Express*, 488 F.2d 714, 717-19 (5th Cir. 1974), adopted by this Circuit. *See Crain* v. *City of Mountain Home*, 611 F.2d 726, 730 (8th Cir. 1979); *Zoll* v. *Eastern Allamakee Com-*

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[41]

Susman	148	hrs at $80/hr	$11,840.00
Beran	116.4	hrs at $60/hr	6,984.00
Shurin	7	hrs at $60/hr	455.00
Expenses			2,758.73
Total			$22,037.73

munity School District, 588 F.2d 246, 252 (8th Cir. 1978). The result obtained is only one factor to be considered, and it is not necessarily an abuse of discretion for the district court to award attorneys' fees based on all of the work performed and not just on the claims on which the plaintiffs were successful. "[A]ttorney's fees awarded under Section 1988 should not be limited to hours expended on those issues as to which the plaintiff was successful." *Crain* v. *City of Mountain Home*, 611 F.2d at 729 n.7. *See also Johnson* v. *Nordstrom-Larpenteur Agency*, 623 F.2d 1279, 1282 (8th Cir.), *cert. denied*, ___ U.S. ___, 101 S.Ct. 622, 66 L.Ed.2d 504 (1980); *Brown* v. *Bathke*, 588 F.2d 634, 637 (8th Cir. 1978).

[27, 28] There is no abuse of discretion in awarding attorneys' fees for a second counsel in a trial of this length and complexity. As for paying for travel time at the same rate as other activities, *Johnson* v. *Georgia Highway Express* indicates that the trial judge should consider whether the activity is legal work or other activity that could be accomplished by nonlawyers. Nonlawyers could not do the traveling for these attorneys; it was within the trial judge's discretion to award fees for the time consumed. Furthermore, the trial judge could have found that the hourly rate reflect inclusion of nonlegal activity.

The argument that the case could have been brought in the Eastern District of Missouri is frivolous. Venue was proper in the Western District and the plaintiffs' attorneys were free to choose the venue best suited to their clients' interests.

VIII. *Conclusion.*

We vacate the district court's finding that the requirement of hospitalization for second trimester abortions, under section 188.025, is unconstitutional. We re-

mand this issue to the district court for futher proceedings and findings as to whether the hospitalization requirement is a substantial burden on a woman's decision to have an abortion and, if so, whether the State has shown a compelling state interest which justifies the requirement.

We vacate the district court's finding that the provisions relating to parental or judicial consent contained in section 188.028 are unconstitutional in their entirety. Although we find the statute impermissibly requires notice to the parents of all minors, we find the judicial consent provision of the statute to be constitutional.

We reverse the district court's finding that section 188.030 of the Missouri statutes imposes strict criminal liability on doctors who abort viable fetuses. We find the Missouri law requires scienter (knowledge) by the physician such that it comports with constitutional requirements. We also reverse the district court's holding that subsection 188.030.2 is unconstitutionally vague.

Finally, we vacate the district court's holding sustaining the constitutionality of section 188.047, requiring pathology reports following all abortions. We find this requirement imposes an undue burden since there is no compelling state interest to justify it, at least in first trimester abortions.

We affirm the district court's finding that the requirement of a second doctor during an abortion of a viable unborn child pursuant to subsection 188.030.3 is unconstitutional. We likewise affirm the court's finding that a 48-hour waiting period as required by subsection 188.039.1 is unconstitutional.

We affirm the district court's finding that a portion of subsection 188.039.2 and all of subsections (1), (2), (3) and (4) thereunder are unconstitutional. These subsections

require notice to parents of all minors and prescribe detailed information a doctor must give a woman seeking an abortion. The district court correctly upheld the right of the state to require the attending physician to inform the woman as to the particular medical risks associated with the abortion technique to be used and the available alternatives. We vacate the district court's finding that the state may require a physician to file post-abortion complication reports under section 188.052.2 and remand this provision for reconsideration in view of the argument made by the parties.

We affirm the ward of attorneys' fees.

The cause is reversed in part and affirmed in part and remanded for further proceedings in accord with our directions. The district court should certify within 90 days its further findings regarding the constitutionality of sections 188.025 and 188.052.2. This court shall retain jurisdiction of this appeal until certification by the district court and further order of this court. Any petition for rehearing should be deferred until final judgment of this court; no mandate is to issue until final judgment is entered.

APPENDIX

AN ACT to repeal sections 188.015, 188.020, 188.025, 188.030, 188.035, 188.050, 188.055, 188.060, and 188.075, RSMo 1978, relating to regulation of abortions, and to enact in lieu thereof fifteen new sections relating to the same subject, with penalty provisions and an emergency clause.

Be it enacted by the General Assembly of the State of Missouri, as follows:

Section 1. Sections 188.015, 188.020, 188.025, 188.030, 188.035, 188.050, 188.055, 188.060 and 188.075, RSMo 1978

are repealed and fifteen new sections enacted in lieu thereof, to be known as sections 188.015, 188.020, 188.025, 188.027, 188.028, 188.030, 188.035, 188.037, 188.039, 188.047, 188.052, 188.055, 188.060, 188.063 and 188.075, to read as follows:

188.015. Unless the language or context clearly indicates a different meaning is intended, the following words or phrases for the purposes of sections 188.010 to 188.085 shall be given the meaning ascribed to them:

(1) "Abortion", the intentional destruction of the life of an embryo or fetus in his or her mother's womb or the intentional termination of the pregnancy of a mother with an intention other than to increase the probability of a live birth or to remove a dead or dying unborn child;

(2) "Abortion facility", a clinic, physician's office, or any other place or facility in which abortions are performed other than a hospital;

(3) "Conception", the fertilization of the ovum of a female by the sperm of a male;

(4) "Physician", any person licensed to practice medicine in this state by the state board of registration of the healing arts;

(5) "Unborn child", the offspring of human beings from the moment of conception until birth and at every stage of its biological development, including the human conceptus, zygote, morula, blastocyst, embryo, and fetus;

(6) "Viability", that stage of fetal development when the life of the unborn child may be continued indefinitely outside the womb by natural or artificial life-supportive systems.

188.020. No person shall perform or induce an abortion except a physician.

188.025. Every abortion performed subsequent to the first twelve weeks of pregnancy shall be performed in a hospital.

188.027. No abortion shall be performed except with the prior, informed and written consent freely given of the pregnant woman.

188.028. 1. No person shall knowingly perform an abortion upon a pregnant woman under the age of eighteen years unless:

(1) The attending physician has secured the informed written consent of the minor and one parent or guardian; or

(2) The minor is emancipated and the attending physician has received the informed written consent of the minor; or

(3) The minor has been granted the right to self-consent to the abortion by court order pursuant to subsection 2 of this section, and the attending physician has received the informed written consent of the minor; or

(4) The minor has been granted consent to the abortion by court order, and the court has given its informed written consent in accordance with subsection 2 of this section, and the minor is having the abortion willingly, in compliance with subsection 3 of this section.

2. The right of a minor to self-consent to an abortion under subdivision (3) of subsection 1 of this section or court consent under subdivision (4) of subsection 1 of this section may be granted by a court pursuant to the following procedures:

(1) The minor or next friend shall make an application to the juvenile court which shall assist the minor or next friend in preparing the petition and notices required

pursuant to this section. The minor or the next friend of the minor shall thereafter file a petition setting forth the initials of the minor; the age of the minor; the names and addresses of each parent, guardian, or, if the minor's parents are deceased and no guardian has been appointed, any other person standing in loco parentis of the minor; that the minor has been fully informed of the risks and consequences of the abortion; that the minor is of sound mind and has sufficient intellectual capacity to consent to the abortion; that, if the court does not grant the minor majority rights for the purpose of consent to the abortion, the court should find that the abortion is in the best interest of the minor and give judicial consent to the abortion; that the court should appoint a guardian ad litem of the child; and if the minor does not have private counsel, that the court should appoint counsel. The petition shall be signed by the minor or the next friend;

(2) Copies of the petition and a notice of the date, time, and place of the hearing shall be personally served upon each parent, guardian or, if the minor's parents are deceased and no guardian has been appointed, any other person standing in loco parentis of the minor listed in the petition by the sheriff or his deputy. If a parent or guardian or, if the minor's parents are deceased and no guardian has been appointed, any other person standing in loco parentis cannot be personally served within two days after reasonable effort, the sheriff or his deputy shall give constructive notice to them by certified mail to their last known address and the hearing shall not be held for at least forty-eight hours from the time of the mailing. In any case where there exists the potential or appearance of conflict of interests between the parents or guardian or next friend of the child and the child, the court shall appoint a guardian ad litem to defend the minor's interests.

The court shall set forth, for the record, the grounds for such appointment;

(3) A hearing on the merits of the petition, to be held on the record, shall be held as soon as possible within five days of the filing of the petition. If any party is unable to afford counsel, the court shall appoint counsel at least twenty-four hours before the time of the hearing. At the hearing, the court shall hear evidence relating to the emotional development, maturity, intellect and understanding of the minor; the nature, possible consequences, and alternatives to the abortion; and any other evidence that the court may find useful in determining whether the minor should be granted majority rights for the purpose of consenting to the abortion or whether the abortion is in the best interests of the minor;

(4) In the decree, the court shall for good cause:

(a) Grant the petition for majority rights for the purpose of consenting to the abortion; or

(b) Find the abortion to be in the best interests of the minor and give judicial consent to the abortion, setting forth the grounds for so finding; or

(c) Deny the petition, setting forth the grounds on which the petition is denied;

(5) If the petition is allowed, the informed consent of the minor, pursuant to a court grant of majority rights, or the judicial consent, shall bar an action by the parents or guardian of the minor on the grounds of battery of the minor by those performing the abortion. The immunity granted shall only extend to the performance of the abortion in accordance herewith and any necessary accompanying services which are performed in a competent manner. The costs of the action shall be borne by the parties.

(6) An appeal from an order issued under the provisions of this section may be taken to the court of appeals of this state by the minor or by a parent or guardian of the minor. The notice of intent to appeal shall be given within twenty-four hours from the date of issuance of the order. The record on appeal shall be completed and the appeal shall be perfected within five days from the filing of notice to appeal. Because time may be of the essence regarding the performance of the abortion, the supreme court of this state shall, by court rule, provide for expedited appellate review of cases appealed under this section.

3. If a minor desires an abortion, then she shall be orally informed of and, if possible, sign the written consent required by section 188.039 in the same manner as an adult person. No abortion shall be performed on any minor against her will, except that an abortion may be performed against the will of a minor pursuant to a court order described in subdivision (4) of subsection 1 of this section that the abortion is necessary to preserve the life of the minor.

188.030. 1. No abortion of a viable unborn child shall be performed unless necessary to preserve the life or health of the woman. Before a physician may perform an abortion upon a pregnant woman after such time as her unborn child has become viable, such physician shall first certify in writing that the abortion is necessary to preserve the life or health of the woman and shall further certify in writing the medical indications for such abortion and the probable health consequences.

2. Any physician who performs an abortion upon a woman carrying a viable unborn child shall utilize the available method or technique of abortion most likely to preserve the life and health of the unborn child. In cases

where the method or technique of abortion which would most likely preserve the life and health of the unborn child would present a greater risk to the life and health of the woman than another available method or technique, the physician may utilize such other method or technique. In all cases where the physician performs an abortion upon a viable unborn child, the physician shall certify in writing the available method or techniques considered and the reasons for choosing the method or technique employed.

3. An abortion of a viable unborn child shall be performed or induced only when there is in attendance a physician other than the physician performing or inducing the abortion who shall take control of and provide immediate medical care for a child born as a result of the abortion. During the performance of the abortion, the physician performing it, and subsequent to the abortion, the physician required by this section to be in attendance, shall take all reasonable steps in keeping with good medical practice, consistent with the procedure used, to preserve the life and health of the viable unborn child; provided that it does not pose an increased risk to the life or health of the woman.

188.035. Whoever, with intent to do so, shall take the life of a child aborted alive, shall be guilty of murder of the second degree.

188.037. No person shall use any fetus or child aborted alive for any type of scientific, research, laboratory or other kind of experimentation either prior to or subsequent to any abortion procedure except as necessary to protect or preserve the life and health of such fetus or child aborted alive.

188.039. 1. No physician shall perform an abortion unless, prior to such abortion, the physician certifies in writting that the woman gave her informed consent, freely

and without coercion, after the attending physician had informed her of the information contained in subsection 2 of this section not less than forty-eight hours prior to her consent to the abortion, and shall further certify in writing the pregnant woman's age, based upon proof of age offered by her.

2. In order to insure that the consent for an abortion is truly informed consent, no abortion shall be performed or induced upon a pregnant woman unless she has signed a consent from that shall be supplied by the state division of health, acknowledging that she and, if she is a minor, her parent or legal guardian or person standing in loco parentis have been informed by the attending physician of the following facts:

(1) That according to the best medical judgment of her attending physician she is pregnant;

(2) The number of weeks elapsed from the probable time of conception of her unborn child, based upon the information provided by her as to the time of her last menstrual period and after a history and physician examination and appropriate laboratory tests;

(3) The probable anatomical and physiological characteristics of the unborn child at the time the abortion is to be performed;

(4) The immediate and long-term physical dangers of abortion and psychological trauma resulting from abortion and any increased incidence of premature births, tubal pregnancies and still births following abortion;

(5) The particular risks associated with the abortion technique to be used;

(6) Alternatives to abortion shall be given by the attending physician, including a list of public and private

agencies and services that will assist her during her pregnancy and after the birth of her child.

3. The physician may inform the woman of any other material facts or opinions, or provide any explanation of the above information which, in the exercise of his best medical judgment, is reasonably necessary to allow the woman to give her informed consent to the proposed abortion, with full knowledge of its nature and consequences.

188.047. A representative sample of tissue removed at the time of abortion shall be submitted to board eligible or certified pathologist, who shall file a copy of the tissue report with the state division of health, and who shall provide a copy of the report to the abortion facility or hospital in which the abortion was performed or induced and the pathologist's report shall be made a part of the patient's permanent record.

188.052. 1. An individual abortion report for each abortion performed or induced upon a woman shall be completed by her attending physician.

2. An individual complication report for any post-abortion care performed upon a woman shall be completed by the physician providing such post-abortion care. This report shall include:

(1) The date of the abortion;

(2) The name and address of the abortion facility or hospital where the abortion was performed;

(3) The nature of the abortion complication diagnosed or treated.

3. All abortion reports shall be signed by the attending physician, and submitted to the state division of health within forty-five days from the date of the abortion. All complication reports shall be signed by the physician pro-

viding the post-abortion care and submitted to the division of health within forty-five days from the date of the post-abortion care.

4. A copy of the abortion report shall be made a part of the medical record of the patient of the facility or hospital in which the abortion was performed.

5. The state division of health shall be responsible for collecting all abortion reports and complication reports and collating and evaluating all data gathered therefrom and shall annually publish a statistical report based on such data from abortions performed in the previous calendar year.

188.055. 1. Every abortion facility, hospital, and physician shall be supplied with forms by the division of health for use in regards to the consents and reports required by sections 188.010 to 188.085. A purpose and function of such consents and reports shall be the preservation of maternal health and life by adding to the sum of medical knowledge through the compilation of relevant maternal health and life data and to monitor all abortions performed to assure that they are done only under and in accordance with the provisions of the law.

2. All information obtained by physician, hospital, or abortion facility from a patient for the purpose of preparing reports to the division of health under sections 188.010 to 188.085 or reports received by the division of health shall be confidential and shall be used only for statistical purposes. Such records, however, may be inspected and health data acquired by local, state, or national public health officers.

188.060. All medical records, reports, and other documents required to be kept under sections 188.010 to 188.085 shall be maintained in the permanent files of the abortion

facility or hospital in which the abortion was performed for a period of seven years.

188.063. No abortion facility shall advertise or hold itself out as also providing counseling to pregnant women unless:

(1) The counseling is done by a licensed physician, registered nurse or other person holding at least a bachelor's degree from an accredited college or university in psychology or appropriate field or having completed special training in counseling;

(2) The counseling includes factual information given in such a manner as to not be misleading, including explicit discussion of the development of the unborn child; and

(3) The counseling includes a thorough discussion of alternatives to abortion and availability of agencies and services to assist her if she chooses to carry her child to term.

2. The prescribed course of study which shall constitute special training in counseling shall be promulgated by the division of health. Any rule or portion of a rule promulgated pursuant to this chapter may be suspended by the joint committee on administrative rules if after hearing thereon the committee finds that such rule or portion of the rule is beyond or contrary to the statutory authority of the agency which promulgated the rule, or is inconsistent with the legislative intent of the authorizing statute. The general assembly may reinstate such rule by concurrent resolution signed by the governor.

188.075. Any person who contrary to the provisions of sections 188.010 to 188.085 knowingly performs or aids in the performance of any abortion or knowingly fails to perform any action required by sections 188.010 to 188.085 shall

be guilty of a class A misdemeanor and, upon conviction, shall be punished as provided by law.

Section A. Because of the necessity for immediate state action to regulate abortions to protect the lives and health of citizens of this state, this act is deemed necessary for the immediate preservation of the public health, welfare, peace and safety, and is hereby declared to be an emergency act within the meaning of the constitution, and this act shall be in full force and effect upon its passage and approval.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 80-1130 and 80-1530

No. 80-1130.

Planned Parenthood Association of Kansas City, Missouri, Inc.,
Naim S. Kassar, M.D.,
Reproductive Health Services,
Allen S. Palmer, D.O.,
Appellees,

v.

John Ashcroft, Attorney General of State of Missouri,
Ralph L. Martin, Prosecuting Attorney of Jackson County, Missouri
Appellants.

No. 80-1530.

Planned Parenthood Association of Kansas City, Missouri, Inc.,
Naim S. Kassar, M.D.
Reproductive Health Services
Allen S. Palmer, D.O.,
Appellants,

v.

John Ashcroft, Attorney General of State of Missouri,
Ralph L. Martin, Prosecuting Attorney of Jackson County, Missouri,
Appellees.

Submitted: November 17, 1980

Filed: November 30, 1981

Appeals from the United States District Court for the Western District of Missouri

Supplemental Opinion to 655 F.2d 848.

Before LAY, Chief Judge, HENLEY, Circuit Judge, and HARRIS,* Senior Judge.

LAY, Chief Judge.

This supplemental opinion is necessitated by reason of our previous certification to the district court relating to two issues. In our original opinion, we vacated the district court's finding that the hospitalization requirement for second trimester abortions, under section 188.025 of the Missouri statutes, is unconstitutional. We remanded that issue to the district court for further proceedings and findings as to whether the hospitalization requirement is a substantial burden on a woman's decision to have an abortion and, if so, whether the state has shown a compelling state interest which justifies the requirement. We also vacated the district court's finding that the state may require a physician to file postabortion complication reports under section 188.152.2 and remanded this provision for reconsideration in view of the argument made by the parties.

In accord with our certification the district court took

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* Oren Harris, Senior District Judge, Eastern and Western Districts of Arkansas, sitting by designation.

additional evidence[1] and made further findings regarding the statute's hospitalization requirements for all second trimester abortions.[2]

The district court, the Honorable Elmo B. Hunter presiding, found: (1) only one hospital in Missouri currently performs second trimester dilatation and evacuation (D&E) procedures; (2) second trimester D&E procedures performed in a hospital are generally significantly more expensive than the same procedures performed in an outpatient facility; and (3) requiring all second trimester abortions to be performed in a hospital results in fewer second trimester procedures being performed than if hospitalization was not required. As a result, the district court found the second trimester D&E procedure, the safest post-12 week abortion technique currently available, is an alternative which is not available to many pregnant women in Missouri. On this basis Judge Hunter found that section 188.025 creates a substantial interference with and imposes a direct burden on a woman's decision to have an abortion.

I. **Second Trimester Hospitalization Requirement.**

Section 188.025 requires that second and third trimester

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[1] Further evidence was taken on these issues in a hearing conducted on August 6-7, 1981. At that hearing, plaintiffs elicited testimony from Judith A. Widdicombe, President and Executive Director of Reproductive Health Services; Wayne Schramm, Director of the Bureau of Health Data Analysis of the Missouri Division of Health; Dr. Stanley Henshaw, Senior Research Associate at the Alan Guttmacher Institute; and Dr. Samuel G. Eubanks, Jr., a board certified specialist in the fields of obstetrics and gynecology. Defendants presented no testimony at this hearing, but at its conclusion did introduce into evidence the deposition of Dr. Willard Cates, taken on July 21, 1981, in Atlanta, Georgia. The deposition of Dr. Cates was duly received by the court.

[2] Section 188.025 states:

Every abortion performed subsequent to the first twelve weeks of pregnancy shall be performed in a hospital.

Mo.Ann.Stat. § 188.025 (Vernon).

abortions be performed in a hospital. Mo.Ann.Stat. § 188.025 (Vernon). If state legislation creates substantial inteference with and imposes a direct burden on a woman's decision to have an abortion, then the state requirement is to be evaluated to determine if it reasonably relates to the state's interest in maternal health. *Roe* v. *Wade,* 410 U.S. 113, 164 (1973); *Planned Parenthood Ass'n* v. *Ashcroft,* 655 F.2d 848, 854 (8th Cir. 1981).

This court concluded previously, and additional evidence presented to the district court reinforces the conclusion, that D&E is the most used and safest procedure for second trimester abortion. *Ashcroft,* 655 F.2d at 855.

At the original trial of this action, the district court concluded that second trimester D&E was available only in one hospital in Missouri. That conclusion rested solely on the personal knowledge of two physicians, neither of whom testified that he was familiar with the policies of the hospitals throughout the state. However, evidence presented at the evidentiary hearing persuasively corroborates the district court finding.[3] The state did not dispute that

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[3] Wayen Schramm, the Director of the Bureau of Health Data Analysis for the Missouri Center for Health Statistics, testified that in 1981 his office began to record second trimester abortions by the D&E method. Only one hospital reported performing any second trimester abortions by the D&E procedure. This is the same hospital, Truman of Kansas City, reported in the previous proceedings before the court.

Stanley Henshaw, Senior Research Associate at the Alan Guttmacher Institute, which collects and analyzes abortion statistics on a state-by-state basis, testified that in 1979 and 1980, three hospitals reported one or more second trimester abortions by any method. The Kansas City hospital did more than 99 per cent of all second trimester abortions in those two years. One hospital reported one second trimester abortion in each of those two years; the other reported three abortions in each of the two years. He testified that the Institute inferred that those latter two hospitals are not really making abortion services available to women given the infrequency of second trimester abortions at those two hospitals.

any hospital other than Truman Medical Hospital has performed or is willing to perform second trimester abortions using the D&E procedures.

The record demonstrates that hospitalized D&E's are more expensive than nonhospitalized D&E's. There exists evidence that some hospitalized second trimester D&E procedures are twice as expensive as nonhospitalized D&E procedures.[4] The district court concluded from the evidence that requiring hospitalized second trimester abortions places a financial burden on many women seeking such abortions.[5] On the basis of the record presented, this finding is not clearly erroneous.

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[4] Dr. Samuel G. Eubanks, Jr., a practicing physician in Louisville, Kentucky, specializes in obstetrics and gynecology. He practices in an office that has performed 15,500 abortions since 1976; he personally has performed approximately 1,400 second trimester D&E's. He testified that in Kentucky the average cost of a nonhospitalized second trimester abortion was about one-half the cost of what it would be in the hospital.

In the original proceedings, witnesses testified that the increase in the cost burden to the woman of obtaining second trimester D&E's in hospitals, rather than clinics, runs from $150.00 to $1,650.00.

[5] During the period when all second trimester abortions were required to be performed in hospitals, 540 procedures were performed. In 1980, when that requirement was removed, the total number of second trimester procedures performed in Missouri was 1,390, 700 of which were performed in hospitals and 690 of which were performed in outpatient facilities. Dr. Henshaw testified that Missouri met only 13 per cent of the perceived need for second trimester abortions in the state in 1979; however, it met 34 per cent of the perceived need in 1980. In 1980, there were two second trimester abortion providers in the state, Truman Medical Hospital of Kansas City and Reproductive Health Services of St. Louis, a clinic. In 1979, only Truman Medical Hospital provided second trimester abortions. Dr. Henshaw would not infer that Reproductive Health Services substantially met all the need for second trimester abortions in the St. Louis area. Dr. Henshaw also testified that nationally 9 per cent of all abortions performed were second trimester abortions. In 1979, 3.4 per cent of all abortions performed in Missouri were second trimester abortions, but in 1980, when

(Continued on next page)

Since section 188.025 creates a substantial interference with and imposes a direct burden on a woman's decision to have an abortion, the state has the burden of showing that Missouri's requirement reasonably relates to the protection of the woman's health. As we stated in our previous decision, the state must show that nonhospitalized D&E procedures can reasonably be considered more dangerous than hospital procedures, including hospitalized D&E. *Ashcroft*, 655 F.2d at 856.

The central issue is the relative safety of nonhospitalized D&E and hospitalized methods. No quantitative studies are cited which directly compare the relative safety of the two procedures. However, the district court has found explicitly that a nonhospitalized second trimester D&E procedure is just as safe as those second trimster D&E procedures conducted in hospitals.[6] Since the district

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Footnote continued
abortions could be performed in outpatient clinics, the figure was 6.9 per cent.

Dr. Eubanks also testified that the higher cost of hospitalized second trimester D&E procedures placed a financial burden on many patients seeking abortions.

[6] We are aware of the Sixth Circuit's decision in *Akron Center for Reproductive Health, Inc.* v. *City of Akron*, 651 F.2d 1198 (6th Cir. 1981). In *Akron*, the plaintiffs tried to show that because of the D&E procedure, abortion through the 17th or 18th week of pregnancy is safer than childbirth. Thus, they argued that, under *Roe* v. *Wade*, the state's interest in maternal health does not become compelling before that time and the requirement that all second trimester abortions be performed in hospitals is unconstitutionally overbroad.

In the district court, the plaintiffs presented evidence that early second trimester clinical abortions were just as safe as second trimester abortions performed in hospitals. The district court, however, did not find plaintiff's evidence so convincing that it was willing to discard the Supreme Court's formulation in *Roe* v. *Wade*.

The Sixth Circuit noted that two district courts held that the state's interest in the health of the pregnant woman does not become compelling until the 18th week of pregnancy. *Margaret* v. *Edwards*, 488 F.

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court's finding is not clearly erroneous, we find that nonhospitalized second trimester D&E procedures are no more dangerous to maternal health than hospitalized procedures. Consequently, we hold that section 188.025 is not reasonably related to maternal health and, therefore, the requirement that *all* second trimester abortions be performed in hospitals is unconstitutional. *See Planned Parenthood* v. *Danforth*, 428 U.S. 52, 76 (1976).

II. Recordkeeping.

Subsection 188.052.2 of the Missouri statutes requires physicians to complete individual complication reports con-

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Footnote continued

Supp. 181, 194-96 (E.D. La. 1980) and *Planned Parenthood Ass'n* v. *Ashcroft*, 483 F. Supp. 679, 687 (W.D. Mo. 190). The Sixth Circuit found the rationale of these decisions persuasive. However, it also found that, by affirming *Gary-Northwest Indiana Women's Services, Inc.* v. *Bowen*, 496 F. Supp. 894, 896-902 (N.D.Ind. 1980), *aff'd sub nom. Gary-Northwest Indiana Women's Services, Inc.* v. *Orr*, ——— U.S. ———, 101 S.Ct. 2012 (1981), the Supreme Court had an opportunity to retreat from the "bright line" drawn in *Roe* v. *Wade* and declined to do so. Thus, it affirmed the district court's holding that the statute was constitutional.

Evidence adduced at the original trial in this cause and the evidentiary hearing suggests that the nonhospitalized procedures may actually be safer. The evidence cited in the original opinion is noted by this court in *Ashcroft*, 655 F.2d at 857 n.12. At the evidentiary hearing, Dr. Willard Cates, Chief of the Abortion Surveillance Branch of the Family Planning Evaluation Division at the Center for Disease Control, stated that in his opinion D&E procedures through 16 weeks after the last menstrual period (14 weeks after conception) are just as safe in outpatient facilities as they are in hospitals. The district court views the testimony of Dr. Cates to say that section 188.025 prevents D&E procedures, particularly in the 15th and 16th weeks after the last menstrual period. Also, the district court concluded that, even though testimony tended to show that hospitals are better equipped to treat postabortion infections, such infections do not occur until 24 to 72 hours after the procedure is completed. By that time a patient will have been dismissed from either a hospital or an outpatient facility.

cerning postabortion care that they provide.[7] Plaintiffs argue that a physician may be faced in completing these reports with the situation where the patient will not or cannot provide the necessary information. Plaintiffs argue that the physician is then faced with the dilemma of filing a report with incomplete date, thereby subjecting himself to criminal liability, or refusing to treat the patient.

The district court was not convinced that a reasonable interpretation of subsection 188.052.2 would place physicians in the dilemma envisioned by plaintiffs. The court interprets the statute to require physicians to complete the reports using data that is reasonably available to them. That interpretation is shared by the Missouri attorney general. Since physicians are required only to report information that is reasonably available to them, section 188.052.2 does not place physicians in the dilemma of refusing treatment to patients or subjecting themselves to criminal liability by filing an incomplete report when the patient refuses to or cannot provide date to be included in the postabortion complication report.

The reporting requirement is not subject to strict scrutiny analysis, as there are no suspect classifications or fundamental rights at stake. The reporting requirement need only be rationally related to a constitutionally permissible purpose. The district court, finding that the reporting require-

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[7] Subsection 1889.052.2 states:

> An individual complication report for any post-abortion care performed upon a woman shall be completed by the physician providing such postabortion care. This report shall include:
>
> (1) The date of the abortion;
>
> (2) The name and address of the abortion facility or hospital where the abortion was performed;
>
> (3) The nature of the abortion complication diagnosed or treated.

Mo.Ann.Stat. § 188.052.2 (Vernon).

ments are consistent with the holding of *Planned Parenthood* v. *Danforth*, *supra*, ruled that it is rationally related. The requirements of subsection 188.052.2 provide the state with information that is helpful to medical assistance, judgments, and medical standards. Thus, it is also reasonably related to the state's interest in protecting maternal health. *Connecticut* v. *Menillo*, 423 U.S. 9, 10-11 (1975); *Roe* v. *Wade*, 410 U.S. at 164.[8]

III. Conclusion

We affirm the district court's finding that the requirement of hospitalization for second trimester abortions under section 188.025 is unconstitutional. We affirm the district court's finding that a state may require a physician to file postabortion complication reports under subsection 188.052.2. These rulings shall be incorporated into our prior judgment, *Planned Parenthood Ass'n* v. *Ashcroft*, 655 F.2d 848 (8th Cir. 1981), and the integrated judgment as not amended shall issue.

It is so ordered.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

[8] Dr. Cates testified that keeping the type of statistics mandated by the statute has been shown to contribute to the safety of abortion procedures.